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90-942

No.

Supreme Court, U.S.  
FILED

DEC 10 1990

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH F. SPANIOL, JR.  
CLERK

October Term, 1990

JEROME B. ROSENTHAL,

Petitioner,

vs.

"JUSTICE DEFENDANTS", and  
"ORGANIZATION DEFENDANTS"  
(Full listing of all parties  
appears in accompanying  
Petition for Cert, p.vi)

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS,  
FOR THE NINTH CIRCUIT

APPENDICES RE: PETITION FOR CERTIORARI

(Petition for Certiorari, in  
accompanying, separate volume)

JEROME B. ROSENTHAL  
6535 Wilshire Blvd.  
Suite 800  
Los Angeles, CA 90048  
(213) 658-6411  
(213) 658-6778

Petitioner, Pro Se



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## **LIST OF APPENDICES**

<u>No.</u>	<u>Description</u>
1.	14th Amendment - U.S. Constitution
2.	6th Amendment - U.S. Constitution
3.	42 U.S.C. Section 1983
4.	(Intentionally omitted)
5.	U.S. Constitution, Article VI, Section 2
6.	Order, United States District Court dismissing FASC, November 21, 1988
7.	Opinion, U.S. Court of Appeals, Ninth Circuit, dated August 1, 1990
8.	Order, U.S. Court of Appeals, Ninth Circuit, September 10, 1990, Denying Petitioner's Petition for Rehearing
9.	29 U.S.C. Section 402(i)
10.	29 U.S.C. Section 411(a)(5)
11.	California Business and Professions Code, Section 6049.1
12.	California Business and Professions Code, Section 6083(c)
13.	California Rules of Court, Rule 955
14.	Order, U.S. Court of Appeals, April 1988
15.	First Amended and Supplemental Complaint (FASC)



**LIST OF APPENDICES (Cont'd)**

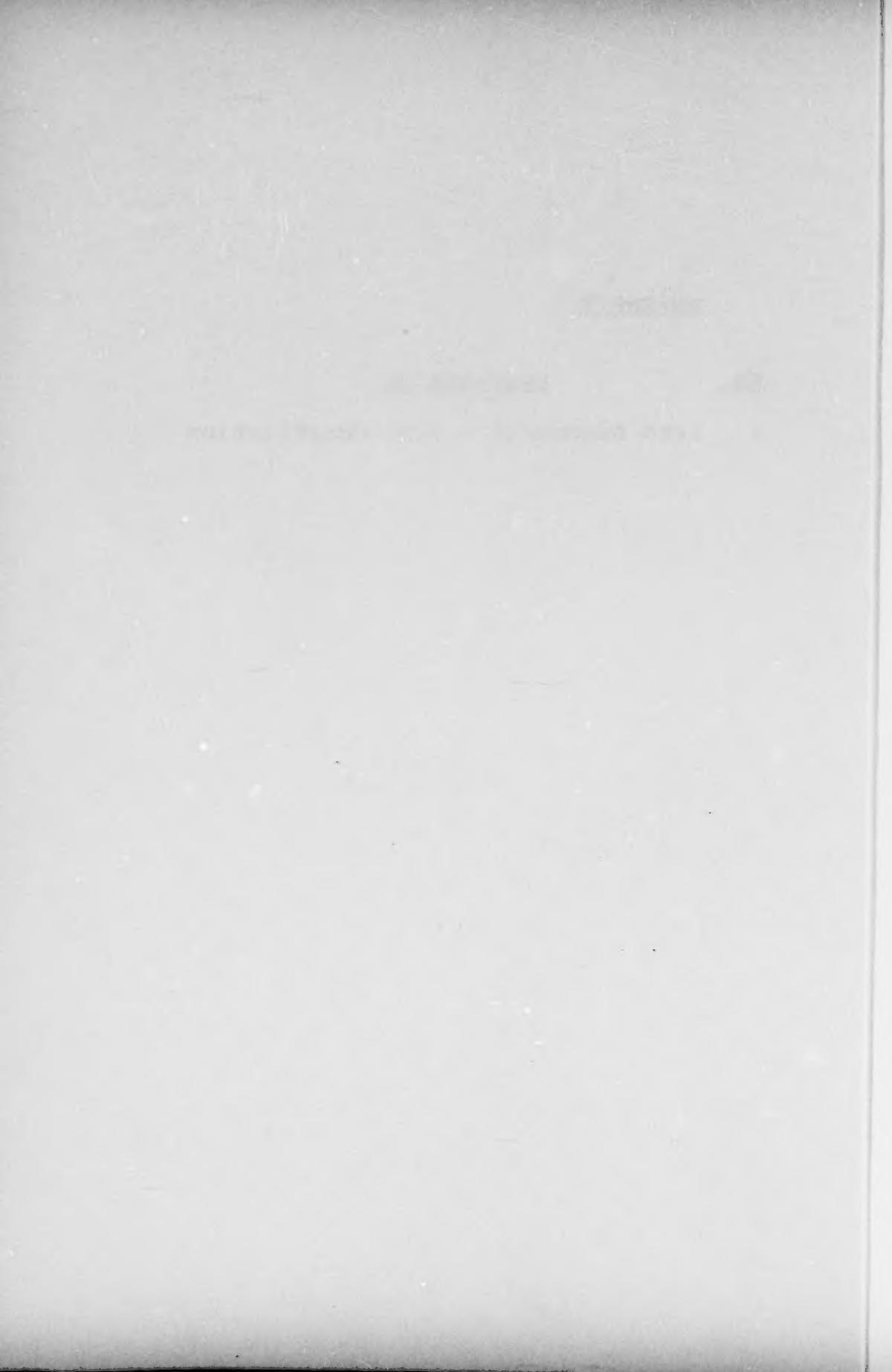
16. Order Denying Rehearing, U.S. Court of Appeals, Ninth Circuit, September 2, 1987
17. Order, California Supreme Court, May 27, 1987, Recusing Lucas, C.J.



## **APPENDIX**

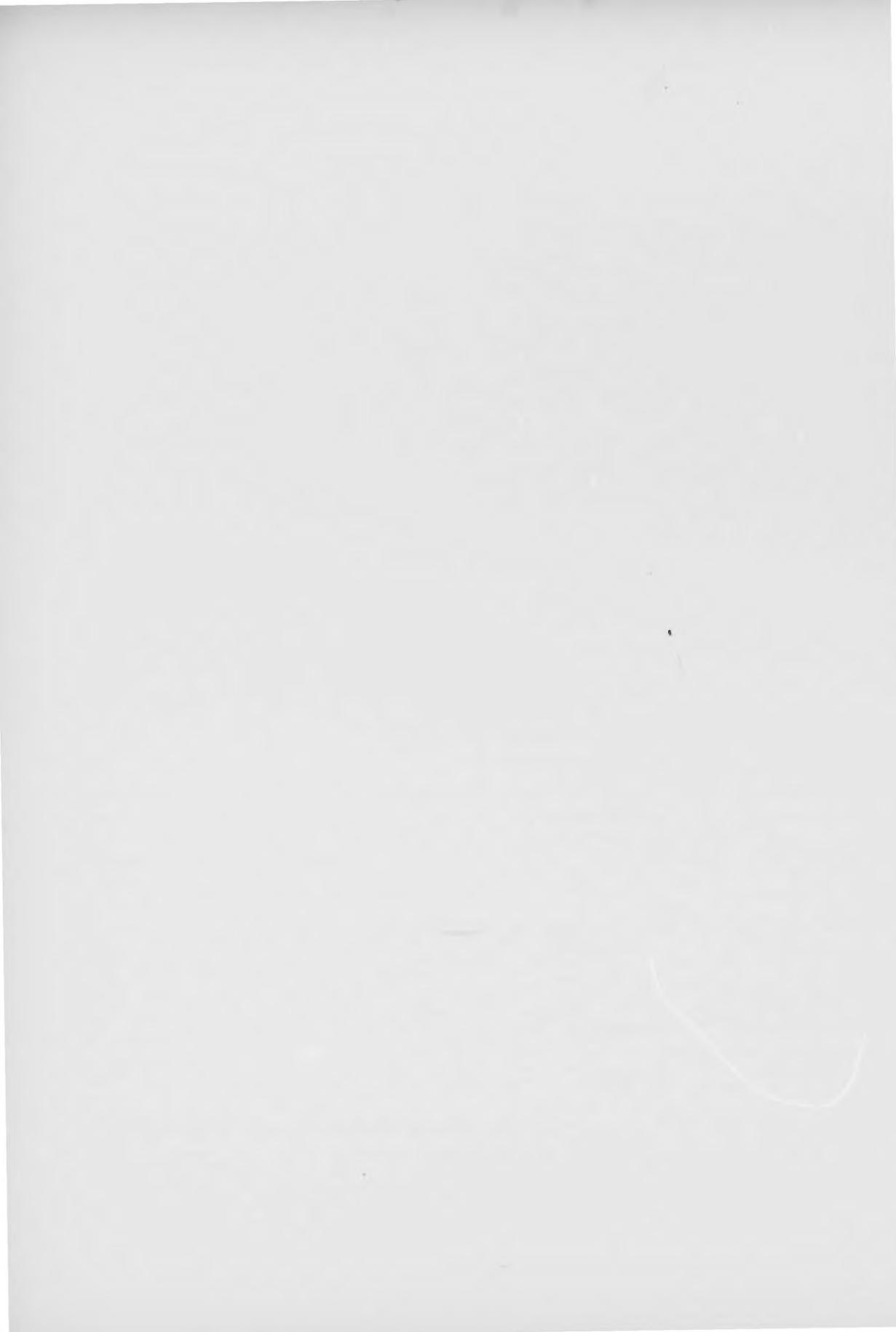
<u>No.</u>	<u>Description</u>
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1.	14th Amendment - U.S. Constitution
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14th Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



## APPENDIX

<u>No.</u>	<u>Description</u>
2.	6th Amendment - U.S. Constitution



**6th AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.



**APPENDIX**

<b><u>No.</u></b>	<b><u>Description</u></b>
3.	42 U.S.C. Section 1983



**SECTION 1983. Civil Action for  
deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended Dec. 29, 1979, P.L. 96-170, Section 1, 93 Stat. 1284).



## **APPENDIX**

<b><u>No.</u></b>	<b><u>Description</u></b>
4.	(Intentionally omitted)



## **APPENDIX**

<u>No.</u>	<u>Description</u>
5.	U.S. Constitution, Article VI, Section 2



**U.S. Constitution, Article VI,**

**Section 2**

"2. This Constitution, and the laws  
of the United States which shall be made  
in pursuance thereof; and all treaties  
made, or which shall be made, under the  
authority of the United States, shall be  
the supreme law of the land; and the  
judges in every State shall be bound  
thereby, any thing in the Constitution or  
laws of any State to the contrary  
notwithstanding."



**APPENDIX**

**No.**                   **Description**

6. Order, United States District Court  
dismissing FASC, November 21, 1988



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Jerome B. Rosenthal      )  
                            )  
Plaintiff,                )  
                            )  
v.                         ) NO. C 87 3104 TEH  
                            )  
"Justice Defendants":    ) ORDER  
Justices of the          )  
Supreme Court of         )  
California;              )  
"Organization            )  
Defendants": State     )  
Bar of California;       )  
Mary Wailes,             )  
Secretary, Terry        )  
Anderlini,              )  
President                )  
                           )  
Defendants.           )

This Court issued an order in JULY  
1987 DISMISSING ALL CLAIMS BROUGHT BY  
PLAINTIFF Rosenthal against the  
California Supreme Court for actions  
relating to his expulsion from the State  
Bar of California. A Ninth Circuit panel



affirmed the dismissal of all but one claim and remanded the case so that this Court could consider plaintiff's challenge to the constitutionality of Cal.Bus. and Prof. Code section 6083(c).

Plaintiff filed an amended complaint that raises three claims: First, Plaintiff alleges that Cal.Bus. and Prof. Code sections 6083(c) and 6049.1 are unconstitutional in that they, respectively, shift the burden of proof in a disbarment proceeding, and violate the confrontation clause. Plaintiff therefore seeks an injunction preventing the California Supreme Court from enforcing the order calling for his disbarment. This is the only one of plaintiff's claims which relates to the constitutionality of a state statute.

Second, plaintiff seeks damages from Chief Justice Malcolm Lucas of the California Supreme Court under 42 USC



Section 1983 for infringement of plaintiff's fourteenth amendment right to Due Process.

Third, plaintiff seeks reinstatement to the Bar, and compensatory and punitive damages from the "organization defendants", i.e., the State Bar of California and its President and Secretary for violation of the Labor Management Reporting and Disclosure Act, 29 USC Section 411(a)(5).

Claim One: A Challenge to the Constitutionality of Two Statutes

(1) Cal.Bus. and Prof. Code 6083(c)

A disciplinary decision of the State Bar of California may be appealed to the California Supreme Court pursuant to California Business and Professional Code Section 6083(c). That statute provides that, on appeal, the burden is on the petitioner to show wherein a decision



recommending suspension or disbarment is erroneous or unlawful. The California Supreme Court then independently examines the record, re-weighs the evidence, and rules on its sufficiency.

Plaintiff claims that Section 6083(c) violates the constitutional guarantee of due process because it shifts the burden of showing error onto the petitioner. Plaintiff would have this Court treat a disbarment proceeding as if it were a criminal prosecution, thus entitling him to the same panoply of procedural safeguards accorded criminal defendants.

In the absence of any statutory or case law characterizing a disbarment proceeding as a criminal matter, plaintiff argues that disbarment is "punitive" and therefore the equivalent of criminal prosecution for constitutional purposes. Plaintiff lacks all authority for that contention. While



courts, on occasion, may create judicial fictions, litigants may not. A disbarment proceeding "is neither civil nor criminal, but an investigation into the conduct of the lawyer/respondent."

Middlesex County Ethics Committee v Garden State Bar Association, 457 U.S. 4223, 433 (1982).

Nevertheless, attorneys cannot summarily be stripped of their right to practice. Disbarment proceedings require procedural due process, including notice and an opportunity to be heard. In Re Ruffallo, 390 U.S. 544 (1967). However, plaintiff in no way alleges that he was denied procedural due process protections and, indeed, nothing in the provisions of the challenged statute denies these protections to plaintiff or to any other member of the Bar subject to discipline.

A disciplinary hearing before the State Bar is an adversary proceeding in



which the State Bar has the burden of establishing misconduct by convincing proof and to a reasonable certainty. Franklin v State Bar of California, 35 Cal.3d 274, 291 (1986). The California Supreme Court must decide independently whether the State Bar's findings are supported by the evidence and it will not consider the allegations proven unless sustained by clear and convincing evidence. Arden v. State Bar of California, 43 Cal.3d 713, 725 (1987). Accordingly, the Court finds that plaintiff's challenge to the constitutionality of Cal. Bus. and Prof. Code Section 6083(c) is without merit.

(2) Cal.Bus.and Prof. Code,

Section 6091.1

Plaintiff challenges the constitutionality of Cal.Bus. and Prof. Code Section 6091.1 which allows the California State Bar to receive in



evidence findings, conclusions, and orders issued pursuant to other disciplinary proceedings involving the same attorney. It was undisputed that no record of other discipline was involved or introduced at plaintiff's disbarment hearing. Plaintiff's attempts to mischaracterize the facts and misquote the law are unavailing; he simply lacks all standing to challenge Section 6091.1.

Even if plaintiff had standing to challenge the statute, his challenge would be fruitless:

It is settled that bar proceedings are not criminal in nature...Accordingly, particular procedural safeguards applicable in criminal and civil litigation are not required in disciplinary proceedings to insure a right to Due Process. Giovanazzi v. State Bar, 28 Cal.3d 465, 472 (1980).

It is also settled that federal courts may consider evidence of state



disciplinary proceedings and decide to discipline attorneys on the basis of that evidence. In Re Ruffallo, 390 U.S. at 550 (1968). Cal. Bus. and Prof. Code Section 6049.1 was enacted to allow the California State Bar similar access to other disciplinary proceedings. Rosenthal v. State Bar of California, 43 Cal.3d 612, 622 (1987). In addition, the statute states that the State Bar, like federal courts, must consider "whether the proceedings of the other jurisdiction lacked fundamental constitutional protection." For all the above reasons, the statute is not unconstitutional.

To the extent that plaintiff attacks the constitutionality of Cal.Bus. and Prof. Code Section 6049.2, the statute which allowed evidence pertaining to former tax and bankruptcy proceedings involving plaintiff to be admitted at his disciplinary hearing, he fails again.



Section 6049.2 meets the standards or procedural due process required in attorney disciplinary proceedings and, therefore, does not violate the Constitution.

Claim Two: Section 1983 Action for Damages Against Chief Justice Malcolm Lucas

In Claim Two, plaintiff seeks \$7,250,000 from Chief Justice Malcolm Lucas for reasons that remain unclear. Plaintiff alleges that in early 1987, Chief Justice Lucas recused himself from participation in the Supreme Court review of plaintiff's State Bar disciplinary proceeding. Despite the recusal, Chief Justice Lucas signed an Order Denying Rehearing dated September 2, 1987.

To the extent that plaintiff's allegations state a cause of action at all, that action is defeated by the



doctrine of judicial immunity. As the United States Supreme Court stated:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall 335, 20 L.Ed. 646 (1972). Pierson v. Ray, 386 U.S. 547, 554 (1967)

The Court in Pierson explicitly held that this settled principle of law was not abolished by Section 1983.

Plaintiff contends that Chief Justice Lucas is not protected by the doctrine of judicial immunity because the Chief Justice acted in the absence of all jurisdiction when he signed the order denying reconsideration. Plaintiff is wrong. By recusing himself from review of the State Bar proceeding, Chief Justice Lucas did not forfeit all his judicial powers. This Court finds, as a matter of law, that Chief Justice Lucas'



signing of the order denying reconsideration was an act within his judicial jurisdiction under Bradley v. Fisher.

Claim Three: Action for Damages Against State Bar for Violation of LMRDA

Plaintiff asserts that the State Bar is a labor organization within the meaning of 29 USC Section 402(i) and that the State Bar violated the Labor Management Reporting and Disclosure Act by recommending that he be disbarred. Plaintiff seeks reinstatement to the California Bar, compensatory and punitive damages, and an injunction prohibiting the State Bar defendants from interfering with his rights as a member and from violating 29 USC Section 411(a)(5).

Only by selectively and deceptively quoting the language of the LMRDA can plaintiff even begin to argue that the



State Bar is a labor organization within the meaning of the act. Section 402(i) of 29 USC states:

"Labor organization" means a labor organization engaged in an industry affecting commerce...and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment...

In disciplinary proceedings such as the one at issue here, the State Bar acts as the administrative arm of the California Supreme Court. In no way does the Bar exist for the purpose of dealing with employers.

Therefore, this Court lacks subject matter jurisdiction to consider plaintiff's claim under LMRDA. Moreover, even if subject matter jurisdiction under LMRDA existed, plaintiff's claim for reinstatement to the State Bar and for damages because of his expulsion are barred because "federal courts do not



have jurisdiction to interfere with disciplinary proceedings of the State Bar of California." Doe v. State Bar of California, 415 F.Supp. 308, 312 (N.D. Cal. 1976), aff'd 582 F.2d 25 (9th Cir. 1978).

### Conclusion

The complaint which ultimately led to Jerome Rosenthal's expulsion from the State Bar of California was lodged over twenty years ago. By misrepresenting facts and law, filibustering, and raising an unrelenting series of frivolous challenges to the order calling for his disbarment, plaintiff has managed to elude justice for over two decades. The game is up.

An attorney disciplinary proceeding is not a criminal prosecution. Cal. Bus. and Prof. Code Section 6083(c) and 6049(1) meet procedural due process



standards and are not unconstitutional. Plaintiff's claim against Chief Justice Malcolm Lucas of the California Supreme Court, to the extent that one exists, is barred by the doctrine of judicial immunity. The State Bar of California is not a labor union within the meaning of LMRDA and, moreover, this Court lacks the authority to interfere in state bar disciplinary proceedings. Accordingly, all three claims raised by plaintiff's amended complaint are hereby DISMISSED with prejudice.

IT IS SO ORDERED.

DATED: November 21, 1988

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Thelton E. Henderson  
United States District Court



APPENDIX

<u>No.</u>	<u>Description</u>
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| 7. | Opinion, U.S. Court of Appeals, Ninth Circuit, dated August 1, 1990 |
|----|---|



FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JEROME B. ROSENTHAL, ESQ.      )  
Plaintiff-Appellant,      )  
                                ) No. 88-15709  
v.                                 )  
                                ) D.C. NO  
JUSTICES OF THE SUPREME      )  
COURT OF CALIFORNIA;      ) CV-87-3104-TEH  
ALLEN BROUSSARD; EDWARD      )  
PANELLI; JOHN A.      )  
ARGUELLES; DAVID N.      ) OPINION  
EAGLESON; MILDRED      )  
LILLIE; VAINO SPENCER;      )  
MARCUS KAUFMAN,      )  
                                )  
DEFENDANTS-APPELLEES.      )

Appeal from the United States District  
Court for the Northern District of  
California, Thelton E. Henderson,  
District Judge, Presiding

Argued and Submitted  
March 13, 1990 - San Francisco,  
California

Filed August 1, 1990



Before: ~~Her~~ et Y. C. Choy, Thomas Tang  
and Robert R. Beezer, Circuit Judges

Opinion by Judge Beezer

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**SUMMARY**

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**ATTORNEYS**

Affirming the district court's judgment of dismissal, the court of appeals held because attorney disciplinary hearings are not criminal proceedings, the normal protections afforded a criminal defendant do not apply.

Appellant Jerome B. Rosenthal was disbarred by the California Supreme Court on the recommendation of the Hearing Panel of the California State Bar and its



Review Department. The recommendation was made after more than ten years of hearings and proceedings following a complaint filed against Rosenthal by a former client, Doris Day and her family. Rosenthal has been disbarred by the court of appeals and appeared before the court pro se. Rosenthal brought this action in federal court to allege constitutional and statutory defects in the state disbarment proceedings. The district court rejected Rosenthal's arguments and dismissed the claims with prejudice. Rosenthal appealed.

[1] Rosenthal argued that Cal.Bus. and Prof. Code Section 6083 which places upon the petitioner the burden of proving to the state Supreme Court that the bar association's recommendation of disbarment is erroneous, violates both the principle of presumption of innocence



and the command of the 14th amendment that the state prove every element of the crime beyond a reasonable doubt. [2] The court rejected Rosenthal's arguments. A lawyer disciplinary proceeding is not a criminal proceeding and as a result, normal protections afforded a criminal defendant do not apply. [3] The State of California provides attorneys subject to discipline with more than constitutionally sufficient procedural due process, and the court declined to hold the statute unconstitutional.

[4] Rosenthal also contended that Chief Justice Lucas, who recused himself from Rosenthal's case in the state Supreme Court, violated Rosenthal's constitutional rights by nevertheless signing on behalf of the court an order denying Rosenthal's petition for rehearing. To the extent that this was



error, it was harmless, for the entire state supreme court affirmed its decision in a second order signed by Acting Chief Justice Arguelles five months later.

[5] Finally, Rosenthal argued that the state bar itself violated federal law in conducting his disbarment proceedings. This claim was grounded in the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 402 et seq., which requires a labor organization to provide a full and fair hearing before it may discipline or expel a member. [6] Rosenthal argued that the state bar is a labor organization under the statute because it deals at least in part with employers. [7] The court concluded, however, that in carrying out its statutory responsibilities regarding attorney discipline, the California State Bar is not a labor organization under the LMRDA.

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**COUNSEL**

Jerome B. Rosenthal, pro se, Los Angeles, California, for the plaintiff-appellant.

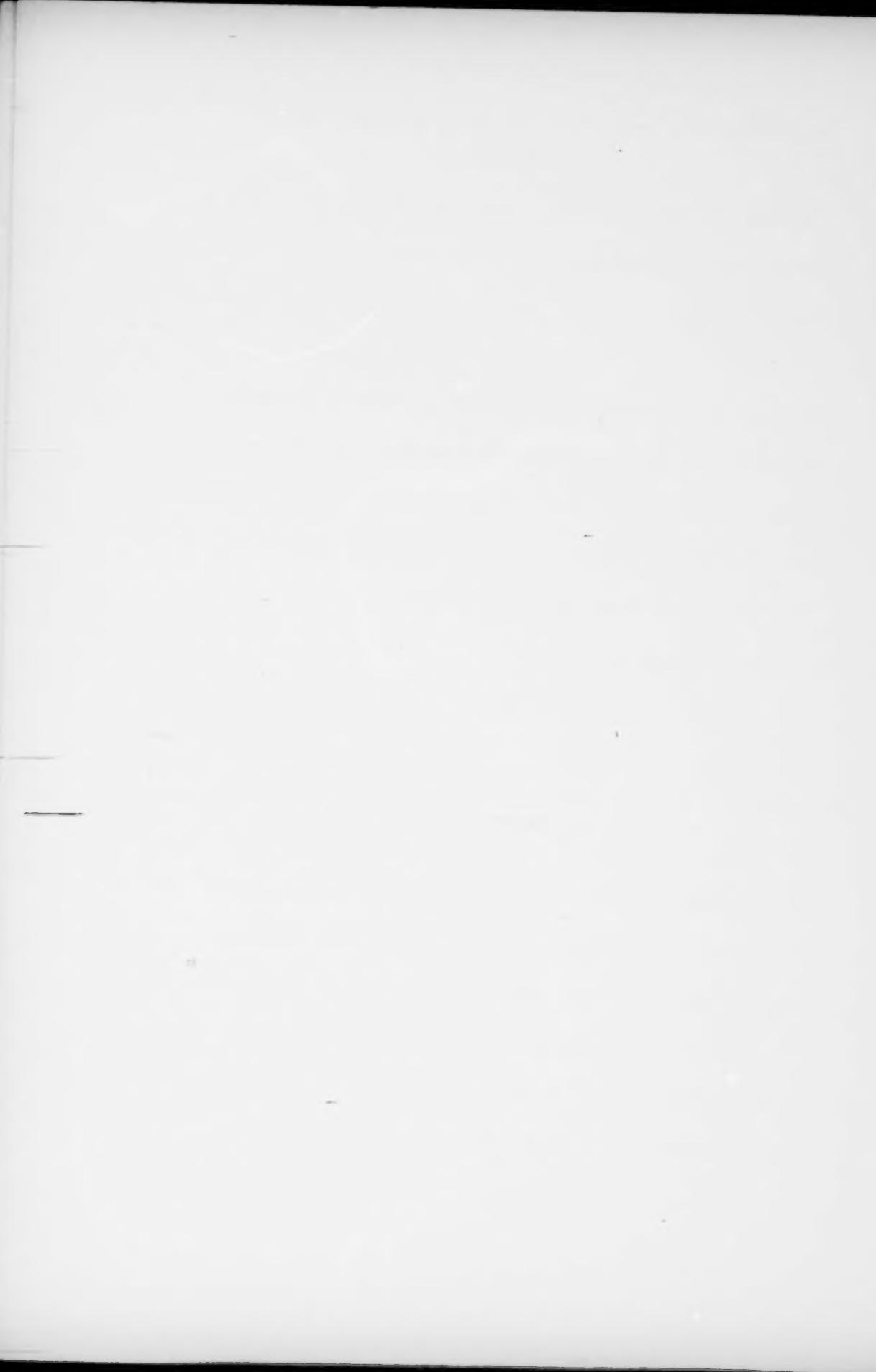
Daniel G. Stone and Cathy A. Neff, Deputy Attorneys General, Sacramento, California and Lawrence C. Yee, State Bar of California, San Francisco, California, for the defendants-appellees.

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**OPINION**

BEEZER, Circuit Judge:

Rosenthal appeals the district court's dismissal of his action against the justices of the California Supreme Court and officers of the state bar associations arising out of his disbarment. We affirm.



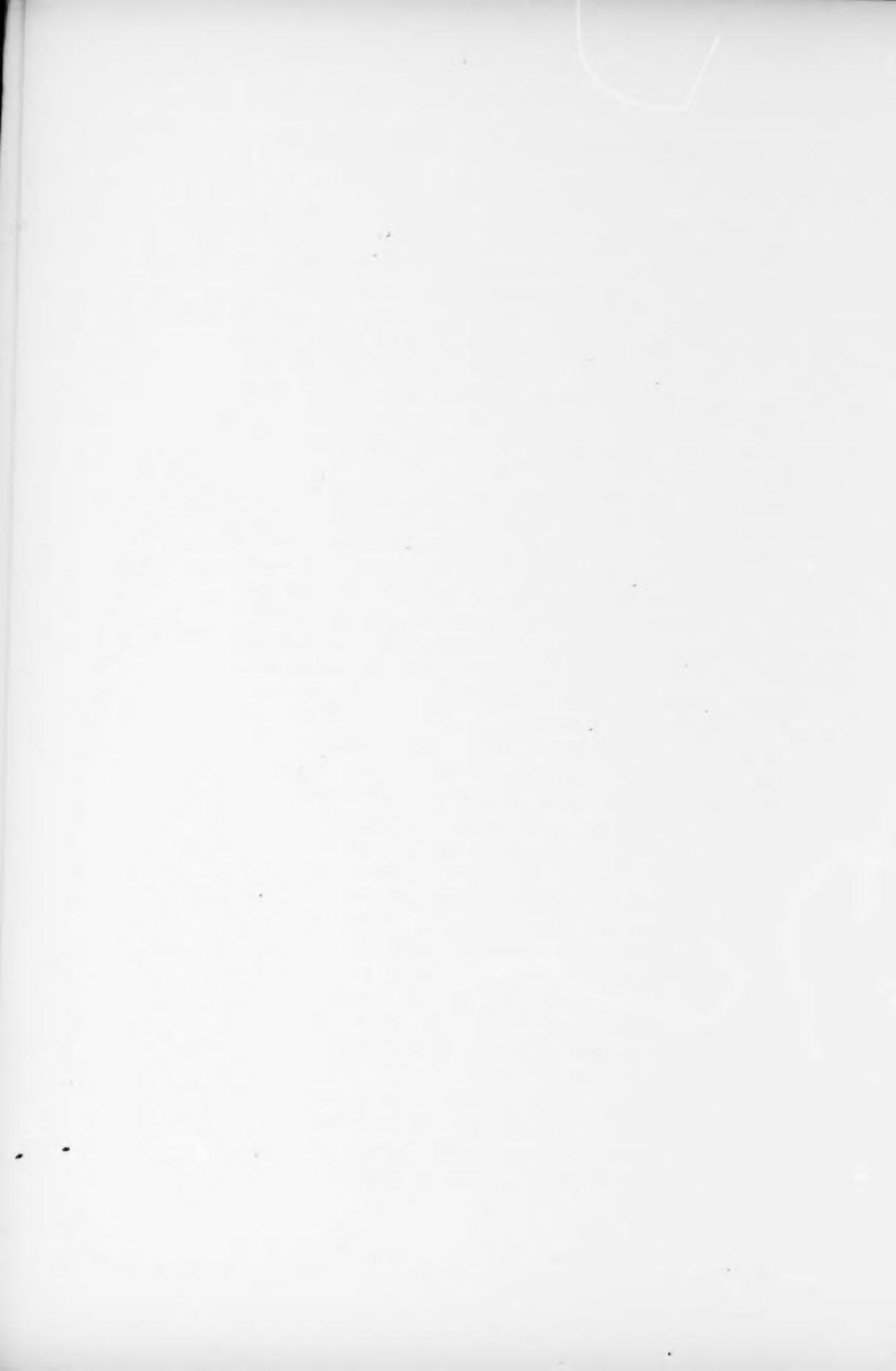
Rosenthal was disbarred by the California Supreme Court on the recommendation of the Hearing Panel of the California State Bar and its Review Department. See Rosenthal v State Bar of California, 43 Cal.3d 612, 238 Cal.Rptr. 377, 738 P.2d 723 (1987) (en banc), appeal dismissed, 109 S.Ct. 35 (1988) (Rosenthal I). The recommendation was made after over ten years of hearings and proceedings following a complaint filed against Rosenthal by a former client, Doris Day, and her family. See id., 43 Cal.3d at 615-21, 238 Cal.Rptr. at 379-83. Rosenthal had represented Day and her husband, Martin Melcher, for 18 years, until Melcher's death in 1968. See Day v Rosenthal, 170 Cal.App. 3d 1125, 217 Cal.Rptr. 89 (App. Ct. 1985), cert. denied 475 U.S. 1048 (1986). During that period, Rosenthal committed



breaches of professional ethics that are difficult to exaggerate.<sup>1</sup> Rosenthal has

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<sup>1</sup> The California Supreme Court found that Rosenthal had among other things, (1) negotiated a retainer agreement giving him a 10% interest in everything the Melchers owned, above and beyond litigation fees; (2) set up oil and gas ventures that cost the Melchers over \$4 million while netting Rosenthal \$400,000 in secret profits and hundreds of thousands of dollars in legal fees; (3) set up sham tax shelters involving the purchase of bonds from other clients of Rosenthal, for which he received a commission without disclosing his conflict of interest, and provoking ten years of tax litigation during which he failed to communicate settlement offers; (4) set up hotel investment schemes toward which the Melchers made constant payments from which Rosenthal, as partial owner, siphoned funds; (5) failed to provide any accounting and convinced Melcher that an audit by Price, Waterhouse & Co. was inaccurate; and (6) convinced Melcher to take, without Day's knowledge or permission, nearly \$3 million from Day's personal accounts to "loan" to family businesses that turned the money over to Rosenthal. During this period Rosenthal received over \$2.5 million in legal fees. Day, 170 Cal.App. 3d at 1135-41, 217 Cal.Rptr. at 94-99. After Melcher's death, the scheme unraveled and Day fired Rosenthal. In response, Rosenthal filed at least 18 lawsuits against Day, id. at 1141, 98; and blocked efforts to salvage funds from the hotel bankruptcy proceedings, costing Day another half-million dollars. Id.



also been disbarred by this court and appears before us pro se. In re Rosenthal, 854 F.2d 1187, 1188 (9th Cir. 1988) (Rosenthal II).

Rosenthal brought this action in federal court to allege constitutional and statutory defects in the state disbarment proceedings.<sup>2</sup> First, he argues that the statute authorizing judicial review of the bar association's recommendation impermissibly shifts the

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When a receiver was appointed, Rosenthal not only refused to turn over documents and files but forced sheriff's deputies to call out a locksmith to gain access to the file room to obtain the Melcher/Day files. *Id.* Rosenthal did all this without ever considering his behavior inappropriate. *Id.* at 1141, 99.

<sup>2</sup> Rosenthal's original federal court complaint was dismissed, but on appeal we held that one of his constitutional claims had facial validity and remanded for a determination on the merits. No. 87-2418, Order dated April 29, 1988. On remand, the district court dismissed the amended complaint. This appeal followed.



burden to him to show the evidence is insufficient to support disbarment. See Cal. Bus. & Prof. Code Section 6083(c). Second, he argues that the statute authorizing admission of documents from other disciplinary proceedings violates the confrontation clause. See Cal. Bus. & Prof. Code Section 6049.1(a). Third, he alleges that Chief Justice Malcolm Lucas of the California Supreme Court, who had earlier recused himself from the case, acted without jurisdiction when he signed an order on behalf of the court denying Rosenthal's petition for rehearing, violating 42 U.S.C. Section 1983. Finally, he charges that the Bar Association violated federal labor law, specifically 29 U.S.C. Section 411(a)(5), by not providing him a "full and fair hearing."

The district court rejected these arguments and dismissed the claims with



prejudice. We review the district court's dismissal of a complaint de novo.

Kruso v Int'l Telephone and Telegraph Corp., 872 F.2d 1416, 1421 (9th Cir. 1989).

I

[1] Rosenthal first argues that Cal. Bus. & Prof. Code Section 6083, which places upon the petitioner the burden to prove to the state Supreme Court that the bar association's recommendation of disbarment is erroneous,<sup>3</sup> principle of presumption of innocence and the command of the 14th Amendment that the state prove every element of an offense beyond

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<sup>3</sup> Cal. Bus. & Prof. Code Section 6083 reads:

(a) A petition to review or to reverse or modify any decision recommending the disbarment or suspension from practice of a member of the State Bar may be filed with the Supreme Court....

(c) Upon such review the burden is upon the petitioner to show wherein the decision or action is erroneous.



a reasonable doubt.

[2] We reject both of Rosenthal's attacks upon Section 6083(c). A lawyer disciplinary proceeding is not a criminal proceeding. See, e.g., Standing Comm. on Discipline v. Ross, 735 F.2d 1168, 1170 (9th Cir.), cert. denied, appeal dismissed, 469 U.S. 1081 (1984). As a result, normal protections afforded a criminal defendant do not apply. The principle of presumption of innocence is a creature of a criminal proceeding; and hence, does not apply in a lawyer disbarment proceeding. Similarly, Section 6083(c) does not violate the command of the 14th Amendment that the state prove every element of an offense beyond a reasonable doubt. That command, which arises from Sandstrom v Montana, 442 U.S. 510 (1975), applies only in criminal proceedings, not in a lawyer disbarment such as this one.



The lawyer subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard. In re Ruffalo, 390 U.S. 544, 550 (1968); Ross, 735 F.2d at 1170. California provides this and other protections. It allows the lawyer to call witnesses and cross-examine them. Emslie v State Bar of California, 11 Cal.3d 210, 226, 113 Cal.Rptr. 175, 183-84, 520 P.2d 991 (1974) (en banc). At the hearing, the burden is on the state to establish culpability "by convincing proof and to a reasonable certainty"; "all reasonable doubts must be resolved in favor of the accused." Id.; see also Arden v. State Bar of Calif., 43 Cal.3d 713, 724, 239 Cal.Rptr. 68, 73, 739 P.2d 1236 (1987) (en banc).<sup>4</sup> The California

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<sup>4</sup> Rosenthal does not argue here that he was denied constitutional protections in his extensive hearings before the bar



Supreme Court, in deciding whether to accept the bar's recommendation, grants the bar's findings "great weight" but is not bound by them. Id. It must "independently examine the record, reweigh the evidence and pass on the sufficiency." Franklin v. State Bar of Calif., 41 Cal. 3d 700, 708, 224 Cal.Rptr. 738, 742, 715 P.2d 699 (1986) (en banc). Once again, "all reasonable doubts will be resolved in favor of the accused." Emslie, 11 Cal. 3d at 220, 113 Cal.Rptr. at 179. The petitioner need only show that the charges "are not

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association or that the burden of proof was wrongly allotted there. Indeed, he raised such arguments before the California Supreme Court, which rejected them as "completely meritless" and "technical defenses devoid of any sincere discussion of the merits of the serious findings against him." Rosenthal I, 43 Cal.3d at 632-33, 238 Cal.Rptr. at 390-91. We have also rejected Rosenthal's challenges to the bar's conduct of the hearings in affirming his disbarment from this court. Rosenthal II, 854 F.2d at 1188.



sustained by convincing proof and to a reasonable certainty." Id.

[3] The State of California provides attorneys subject to discipline with more than constitutionally sufficient procedural due process. We decline to hold this statute unconstitutional.

## II

Rosenthal next argues that the California statute authorizing admission of documents from other disciplinary proceedings violates the confrontation clause. Cal. Bus. & Prof. Code Section 6049.1(a) provides:

In any disciplinary proceeding under this Chapter, a certified copy of a final order made by any court of record...determining that a member of the State Bar



committed professional misconduct...shall be conclusive evidence that the member is culpable of professional misconduct in this state...

At the time the proceeding against Rosenthal was commenced, the statute provided that:

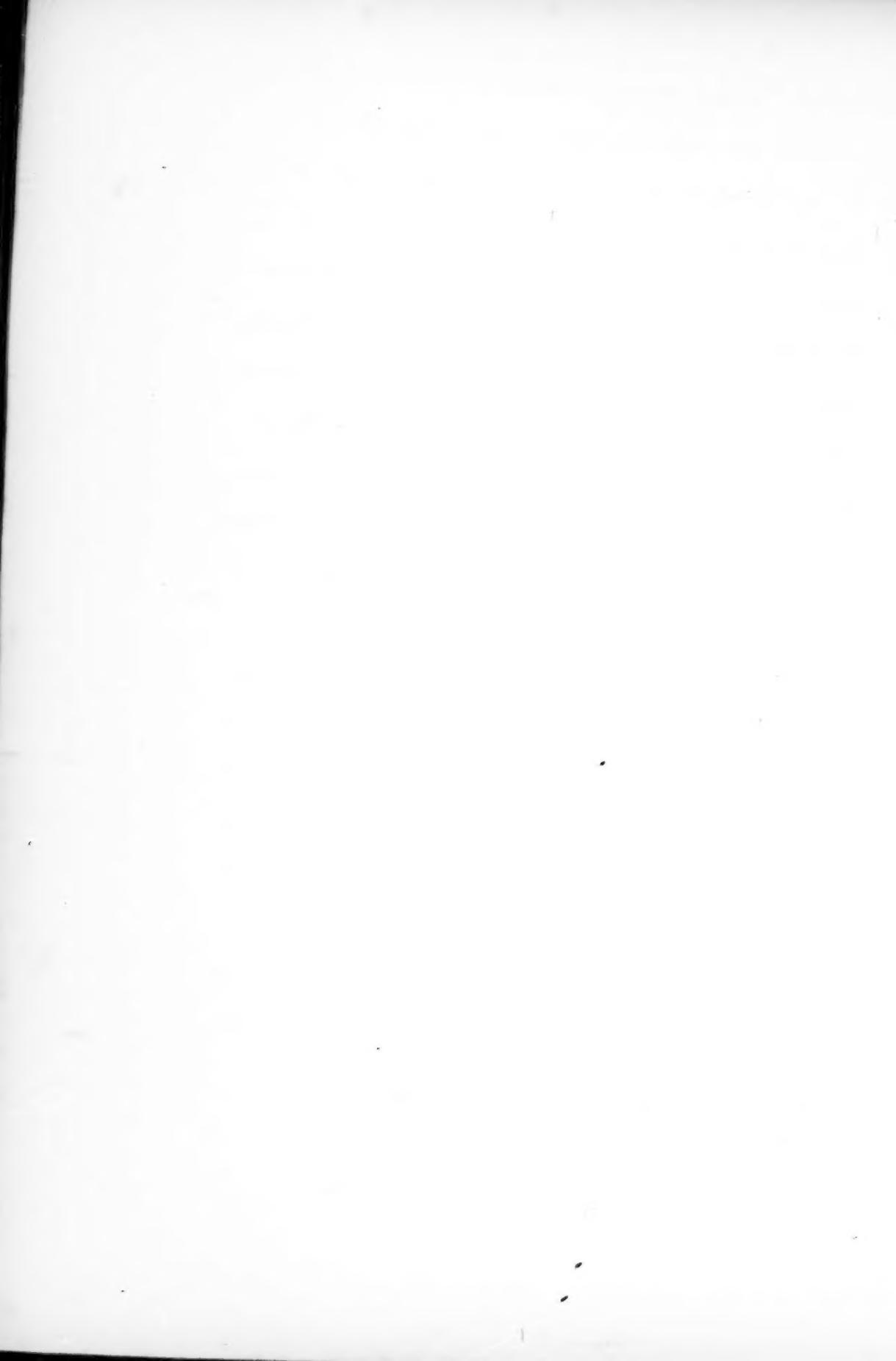
authenticated copies of findings, conclusions, orders or judgments made or entered in any court of record...in any disciplinary proceeding therein against the same person, shall be admissible...

The former statute also allowed admission of the "authenticated transcript of the testimony taken in...out-of-state proceedings." Id. Rosenthal argues that these provisions deny him the right to cross-examine witnesses from other proceedings and violate the sixth amendment.

The state court decision in this



matter shows that Rosenthal had no prior record of discipline. See Rosenthal I, 43 Cal. 3d at 621, 238 Cal. Rptr. at 383. Rosenthal denies no record of a disciplinary proceeding against him that was admitted at his hearing. He points to the findings of a bankruptcy court that were admitted over his objections, arguing that because they were findings they fall under Section 6049.1. The findings were, however, admitted under a different statute, namely Cal.Bus. & Prof. Code Section 6049.2. See Rosenthal I, 43 Cal.3d at 633, 238 Cal.Rptr. at 391. Rosenthal's challenge to that statute was rejected by the California Supreme Court because he was a party to all the underlying proceedings and had a full opportunity to cross-examine adverse witnesses there. Id. He does not challenge Section 6049.2 here.



We reject Rosenthal's confrontation clause claim. The confrontation clause is a criminal law protection. Therefore, it does not apply to a disbarment case. In any event, we agree with the district court that Rosenthal has shown no "injury in fact," much less a "concrete and particularized one," flowing from application of Section 6049.1, the statute he challenges in this action. He fails to meet even the threshold test of standing to raise this claim. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 79-80 (1978).

### III

[4] Rosenthal next argues that Chief Justice Lucas, who recused himself from Rosenthal's case in the California Supreme Court, violate Rosenthal's constitutional rights by nevertheless signing on behalf of the court an order denying Rosenthal's petition for



rehearing. To the extent this was error, it was harmless, for the entire state supreme court affirmed its decision in a second order signed by Acting Chief Justice Arguelles five months later. The second order specified that the decision to deny Rosenthal's petition for rehearing was unopposed. Furthermore, even if the order signed by Chief Justice Lucas were void, see Giometti v Etienne, 28 P.2d 913, 914 (Cal. 1934), rehearing would automatically have been denied when the time for granting Rosenthal's petition expired on September 11, 1987.

Any injury to Rosenthal caused by Chief Justice Lucas' signing of the order was cured by the later order. But even if it were not, and the Chief Justice acted in excess of his jurisdiction, we agree with the district court that he remained immune from suit. A judge is



immune from suit under 42 U.S.C. Section 1983 for acts in excess of his jurisdiction, so long as the acts themselves were judicial. Stump v Sparkman, 435 U.S. 349, 355-57, 363 n. 12 (1978); Bradley v Fisher, 80 U.S. (13 Wall) 335, 351 (1971); cf. Forrester v White, 108 S.Ct. 538, 544 (1988) (administrative functions not judicial acts); Gregory v Thompson, 500 F.2d 59, 63-64 (9th Cir. 1974) (physical assault on person in courtroom not judicial act). The scope of a judge's jurisdiction will be construed broadly. Stump, 435 U.S. at 363. The signing of this order was manifestly a judicial act and this claim was properly dismissed.

#### IV

[5] Finally, Rosenthal argues that the state bar itself violated federal law in conducting his disbarment proceedings. This claim is grounded in the Labor



Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. Section 402, et seq., which requires a "labor organization" to provide a "full and fair hearing" before it may discipline or expel a member. 29 U.S.C. Section 411(a)(5).

A "labor organization" is defined by the statute as either "the certified representative of employees" or an organization "recognized as acting as the representative of employees," 29 U.S.C. Sections 402(j)(1),(2), which "exists for the purpose, in whole or in part, of dealing with employers" 29 U.S.C. Section 402(i). Such an organization must, among other things, report annually to the Secretary of Labor. 29 U.S.C. Section 431.

[6] Rosenthal argues that the state



bar is a "labor organization" under the statute because it deals at least in part with "employers." He directs us to no case supporting his proposition and we are aware of none. The Supreme Court has recognized a "substantial analogy" between the California State Bar and a labor union for first amendment purposes. See Keller v. State Bar of California, 58 U.S.L.W. 4661, 4663 (U.S. June 4, 1990) (No. 88-1905) (Keller II). This analogy does not establish that the bar association is a labor union. On the contrary, substantial differences remain. The California State Bar is created by state law "to regulate the State's legal profession" and "improv[e] the quality of legal services." Id. at 4661, 4664. A labor union is organized primarily to conduct collective bargaining with management, a benefit bar members do not enjoy. Id. at 4663-064. See also



Lathrop v. Donohue, 367 U.S. 820, 842-43, 848 (1961) (opinion of Brennan, J.); id. at 849 (Harlan, J., concurring) (noting similarities in legislative activities and public interest justifications).

Other federal courts have recognized that the two types of organizations raise similar membership and first amendment issues, but otherwise involve different areas of the law. See Levine v Heffernan, 864 F.2d 457, 461 (7th Cir. 1988) (district court was "forced to analogize the integrated bar to the union shop" which was "not...the identical area of the law"), cert. denied, 110 S.Ct. 204 (1989); Gibson v. The Florida Bar, 798 F.2d 1564, 1568 (11th Cir. 1986); Arrow v Dow, 544 F.Supp. 458, 460 (D. N.M. 1982). State courts have come to the same conclusion. See Falk v. State Bar of Michigan, 418 Mich. 270, 342 N.W.2d 504,



514 (1983); Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790, 799 (1969) (under state right to work act, state bar "is not a labor organization, the lawyer is not an employee, nor is the client an employer"); In re Integrating the Bar, 222 Ark. 35, 259 S.W. 2d 144, 151 (1953) (bar does not represent lawyers regarding wages or working conditions "and bargains with no one").

[7] In recommending disbarment, the bar association is not a private organization disciplining its members, but an "administrative arm" of the state Supreme Court designed to assist its decisionmaking. See Chaney, 386 F.2d at 966. Final authority for disbarment rests not with the bar but with the state Supreme Court. Keller II, 58 U.S.L.W. at 4663. For this and other reasons, the California state bar is established by



the legislature, holds public meetings, and is governed at least in part by persons appointed by the governor who are not bar members. See Keller v. State Bar of California, 47 Cal.3d 1152, 255 Cal.Rptr. 542, 548, 767 P.2d 1020 (en banc) (Keller I), rev'd on other grounds, 58 U.S.L.W. 4661 (U.S. June 4, 1990) (No. 88-1905). We conclude that in carrying out its statutory responsibilities regarding attorney discipline, the California State Bar is not a "labor organization" under the LMRDA.

The district court also concluded that, to the extent Rosenthal challenges the fairness of the hearings, they have already been reviewed by the California Supreme Court. That court has concluded that the bar's recommendation was proper. Only the United States Supreme Court, and not this court, has jurisdiction to look behind that decision. District of



Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 482 (1983); Doe v. State Bar of California, 415 F. Supp. 308, 312 (N.D. Cal. 1976), aff'd, 582 F.2d 25 (9th Cir. 1978).

V

We hold that the district court correctly dismissed Rosenthal's claims. The judgment of the district court is

**AFFIRMED.**



**APPENDIX**

**No.**                   **Description**

8. Order, U.S. Court of Appeals, Ninth Circuit, September 10, 1990, Denying Petitioner's Petition for ReHearing



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLERK, U.S. COURT OF APP

JEROME B. ROSENTHAL, Esq.,	)	C.A. No. 88-15709
	)	
Plaintiff-Appellant,	)	D.C. No. CV-87-3104-TEH
	)	
v.	)	
	)	
JUSTICES OF THE SUPREME COURT OF	)	ORDER
CALIFORNIA; ALLEN BROUSSARD; EDWARD	)	
PANELLI; JOHN A. ARGUELLES; DAVID	)	
N. EAGLESON; MILDRED LILLIE; VAINO	)	
SPENCER; MARCUS KAUFMAN,	)	
	)	
Defendants-Appellees.	)	
	)	

Before: CHOY, TANG and BEEZER, Circuit Judge:

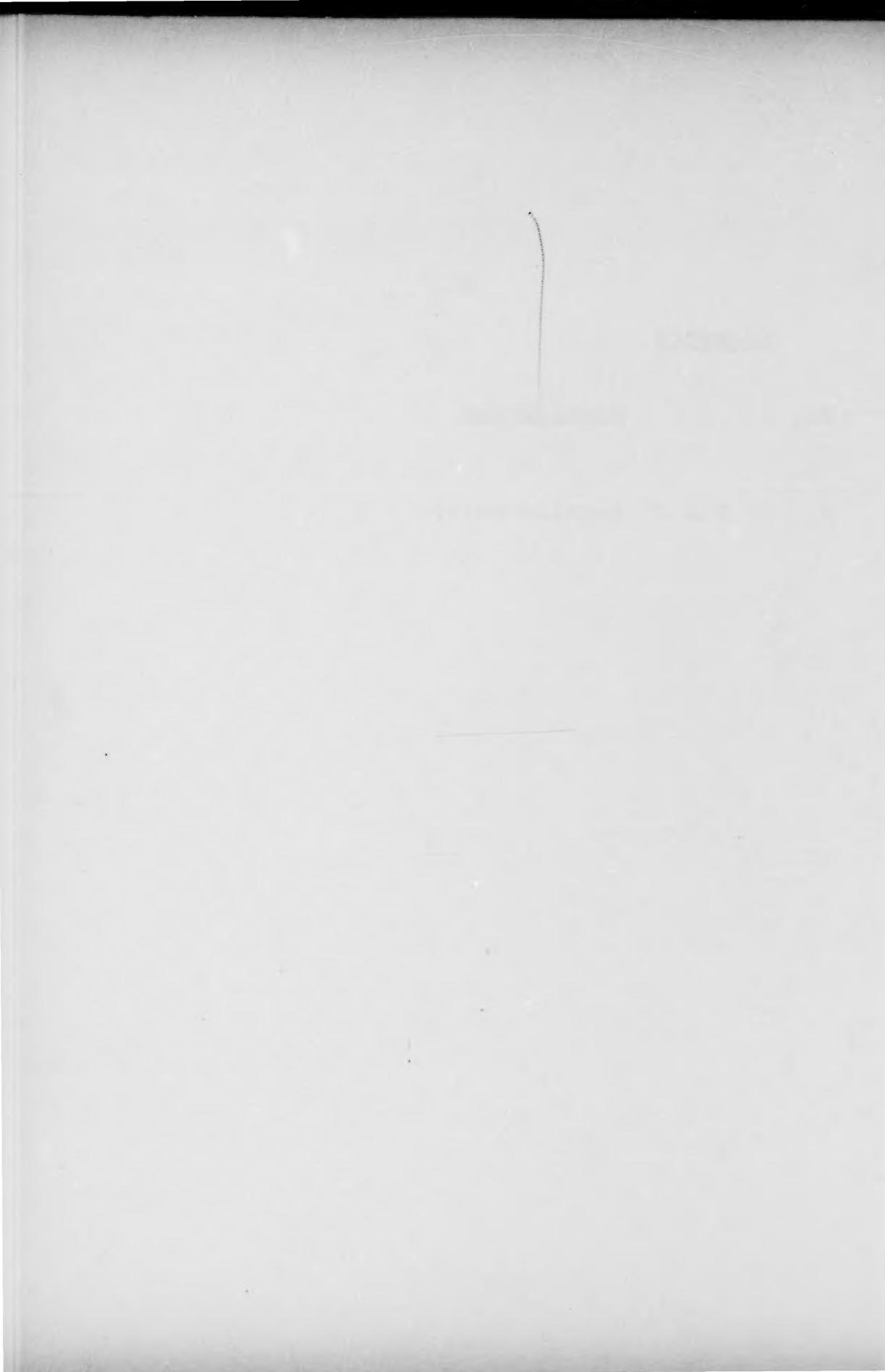
Appellant's petition for rehearing is denied.



**APPENDIX**

**No.**                   **Description**

9. 29 U.S.C. Section 402(i)



**29 U.S.C. Section 402(i)**

**Section 402. Definitions.**

(i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.



**APPENDIX**

**No.**                   **Description**

10. 29 U.S.C. Section 411(a)(5)



**29. U.S.C. Section 411(a)(5)**

(a)(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.



**APPENDIX**

<b><u>No.</u></b>	<b><u>Description</u></b>
11.	California Business and Professions Code, Section 6049.1



BUSINESS AND PROFESSIONS CODE

SECTION 6049.1

"Section 6049.1      R e c o r d s      a n d  
transcripts in disciplinary proceedings  
as evidence.

In all disciplinary proceedings  
in this State, certified or duly  
authenticated copies of findings,  
conclusions, orders or judgments made or  
entered in any court of record, or any  
body authorized by law or by rule of  
court to conduct disciplinary proceedings  
against attorneys, of the United States,  
or of any State or Territory of the  
United States or of the District of  
Columbia in any disciplinary proceeding  
therein against the same person, shall be  
admissible in evidence, and so far as  
relevant and material shall be prima  
facie evidence of the facts, matters and



**things set forth therein."**

**The duly authenticated transcript of  
the testimony taken in such out-of-state  
proceedings shall be admissible in  
evidence in any disciplinary proceeding  
against the same person in this State.**



**APPENDIX**

<b><u>No.</u></b>	<b><u>Description</u></b>
12.	California Business and Professions Code, Section 6083(c)



Cal. Bus. & Prof. Code Section 6083

reads:

"(a) A petition to review or to reverse or modify any decision recommending the disbarment or suspension from practice of a member of the State Bar may be filed with the Supreme Court by the member within 60 days after the filing of the decision recommending such discipline.

(b) A petition to review or to reverse or modify any decision reprobating a member of the State Bar, or any action enrolling him as an inactive member pursuant to Section 6007 of this code or refusing to restore him to active membership, pursuant to such section may be filed



with the Supreme Court by the member  
within 60 days after service upon him  
of notice of such decision or action.

(c) Upon such review the burden is  
upon the petitioner to show wherein  
the decision or action is erroneous  
or unlawful."



**APPENDIX**

**No.**                   **Description**

13. California Rules of Court, Rule 955



**Rule 955. Duties of Disbarred, Resigned  
or Suspended Attorneys**

**"(a) [Disbarment, Suspension and Resignation Orders]** The Supreme Court may include in an order disbarring or suspending an attorney or accepting his resignation a direction that the attorney shall, within such time limit as the Court may prescribe, (1) notify all clients being represented in pending matters and any co-counsel of his disbarment, suspension or resignation and his consequent disqualifications to act as an attorney after the effective date of his disbarment, suspension or resignation, and, in the absence of co-counsel, also notify the clients to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another attorney or attorneys in his place, (2) deliver to



all clients being represented in pending matters any papers or other property to which the clients are entitled, or notify the clients and any co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining, calling attention to any urgency for obtaining the papers or other property, (3) refund any part of any fees paid in advance that have not been earned, and (4) notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties or his disbarment, suspension or resignation and his consequent disqualification to act as an attorney after the effective date of his disbarment, suspension or resignation, and file a copy of the notice with the court, agency or tribunal before which the litigation is pending for inclusion in the respective file or



files."

"(b) [Notices to Clients, Co-Counsel, Opposing Counsel and Adverse Parties]

All notices required by an order of the Supreme Court pursuant to this rule shall be given by registered or certified mail, return receipt requested, and shall contain an address where communications may thereafter be directed to the disbarred, suspended or resigned attorney."

"(c) [Filing Proof of Compliance]

Within such time limit as the Court may prescribe after the effective date of the disbarment or suspension order or the order accepting the resignation, the disbarred, suspended, or resigned attorney shall file with the Clerk of the Supreme Court, with proof of service of a copy on The State Bar at its San Francisco office, an affidavit showing that he has fully complied with those



provisions of the order entered pursuant to this rule. Such affidavit shall also set forth an address where communications may thereafter be directed to the disbarred, suspended, or resigned attorney.

"(d) [Required Records] A disbarred, suspended or resigned attorney shall keep and maintain records of the various steps taken by him under the disbarment or suspension order or the order accepting his resignation so that, upon any subsequent proceeding instituted by or against him, proof of compliance with the order will be available for receipt in evidence."

"(e) [Sanctions for Failure to Comply] A disbarred or resigned attorney's wilful failure to comply with the provisions of this rule constitutes a ground for denying his application for reinstatement or readmission. A



suspended attorney's wilful failure to comply with the provisions of this rule constitutes a cause for his disbarment or suspension and for revocation of any probation then pending. Additionally, the Supreme Court may punish such wilful failure by exercise of its contempt power.

**Adopted** by the Supreme Court of California, effective April 4, 1973."



APPENDIX

No.                    Description

14. Order, U.S. Court of Appeals, April  
1988

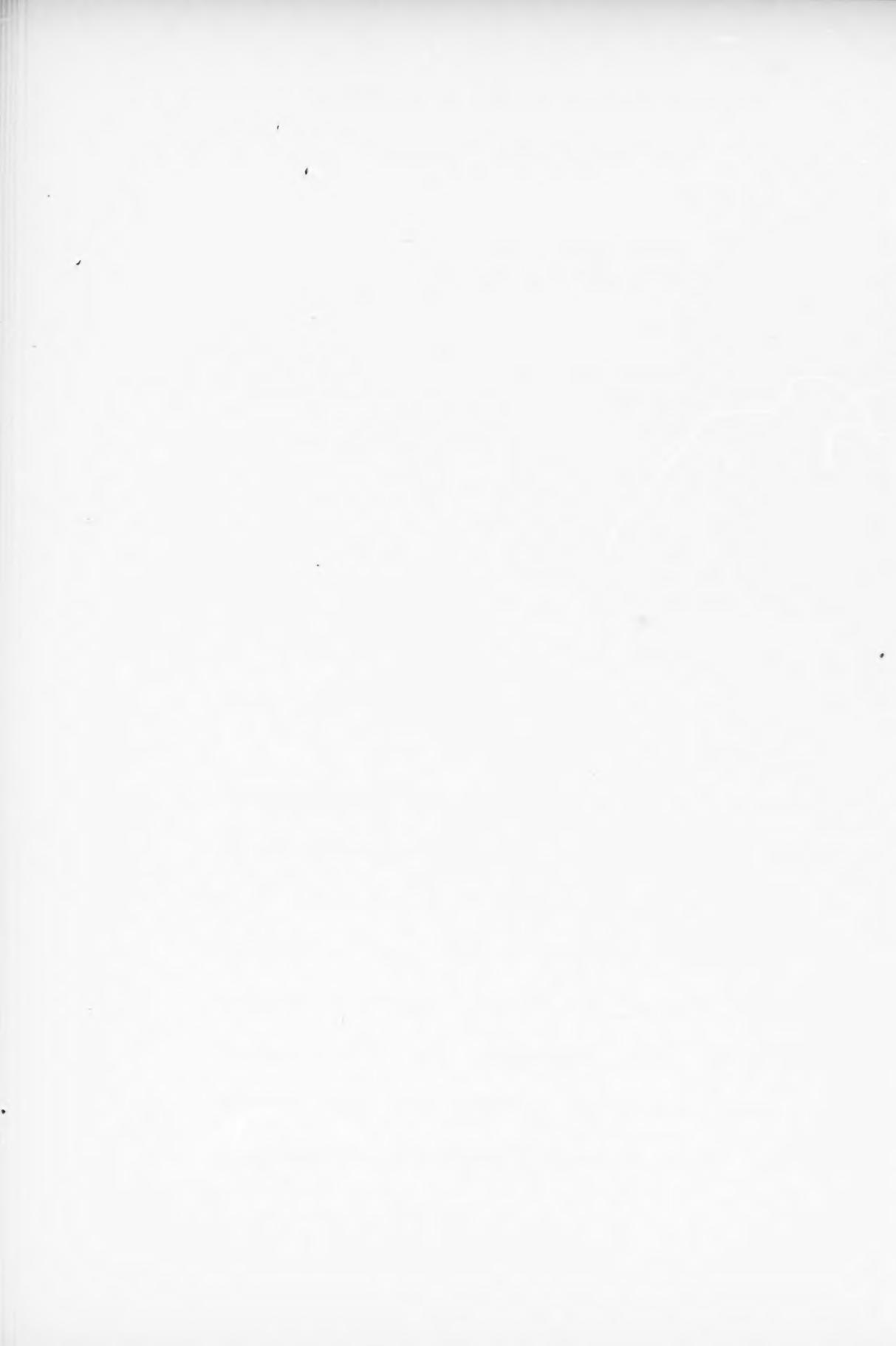


UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JEROME B. ROSENTHAL, ESQ. )  
Plaintiff-Appellant, )  
v. ) No. 87-2481  
JUSTICES OF THE SUPREME )  
COURT OF CALIFORNIA; ) CV-87-3104-TEH  
ALLEN BROUSSARD; EDWARD ) Northern  
PANELLI; JOHN A. ) California  
ARGUELLES; DAVID N. ) (San  
EAGLESON; MILDRED ) ORDER  
LILLIE; VAINO SPENCER; )  
MARCUS KAUFMAN, )  
DEFENDANTS-APPELLEES. )

Before: GOODWIN, SCHROEDER and  
PREGERSON, Circuit Judges

The district court dismissed appellant's complaint with prejudice on the ground that "[j]udges are [absolutely] immune from liability for actions under 42 U.S.C. Section 1983." Dismissal was improper on this ground because, although judges are absolutely immune from damages liability, Pierson v



Ray, 386 U.S. 547 (1969), this court has previously held that the immunity accorded parties in the exercise of judicial functions is limited to actions for damages and does not extend to suits for injunctive relief. Shipp v Todd, 568 F.2d 133, 134 (9th Cir. 1978); see Supreme Court of Virginia v Consumers Union, 446 U.S. 719, 735-36 (1980).

This Court may affirm on any ground in the record. Jacobson v Tahoe Regional Planning Agency, 566 F.2d 1353, 1361 and n. 14 (9th Cir. 1977). With the exception of the constitutional challenge to Cal. Bus. & Prof. Code Section 6083(c) (Deering 1976), Rosenthal's complaint sought collateral review of his particular disbarment proceeding. A federal district court has no authority to review final judgments resulting from a state court judicial proceeding; review must be sought in the United States



Supreme Court. 28 U.S.C. Section 1257;  
District of Columbia Court of Appeals v  
Feldman, 460 U.S. 462, 476, 482 (1983).  
Therefore, dismissal of all but one claim  
of the complaint is affirmed on the  
ground that the district court lacked  
subject matter jurisdiction over the  
complaint.

However, to the extent that Rosenthal's complaint presents a facial challenge to the constitutionality of Section 6083(c) requiring the district court to independently assess the validity of the rule, rather than review the final judgment of the state court, the court had subject matter jurisdiction over the complaint. See id. at 486-88. Therefore, we reverse the district court's decision and remand the case for proceedings consistent with this order.  
See id.



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4



**APPENDIX**

**No.**                   **Description**

15. First Amended and Supplemental  
Complaint (FASC)



JEROME B. ROSENTHAL  
6535 Wilshire Boule  
Suite 800  
Los Angeles, California 90048  
(213) 658-6411

Plaintiff, Pro Se

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JEROME B. ROSENTHAL, )  
Plaintiff, ) Case No.  
vs. ) C87-3104 TEH  
"JUSTICE DEFENDANTS": )  
JUSTICES OF THE ) FIRST AMENDED AND  
SUPREME COURT OF ) SUPPLEMENTAL  
CALIFORNIA, ALLEN ) COMPLAINT FOR  
BROUSSARD, ACTING CHIEF ) RESTRAINT AND  
JUSTICE; AND HONORABLE ) INJUNCTIONS; FOR  
EDWARD PANELLI, ) DETERMINATION OF  
HONORABLE JOHN A. ) FEDERAL  
ARGUELLES, HONORABLE ) UNCONSTITUT-  
DAVID N. EAGLESON, ) IONALITY OF STATE  
HONORABLE MILDRED ) STATUTE (CLAIM  
LILLIE, HONORABLE ) ONE); FOR DAMAGES  
VAINO SPENCER, ) AGAINST ONE  
HONORABLE MARCUS ) DEFENDANT ONLY  
KAUFMAN, JUSTICES; ) (CLAIM TWO);  
MALCOLM M. LUCAS, ) LMRDA 29 U.S.C.  
CHIEF JUSTICE; ) 185(C)(2), 411(a)  
"ORGANIZATION ) (1)(5)(A)(B)(C),  
DEFENDANTS": ) 412 (CLAIM THREE)  
STATE BAR OF CALIFORNIA) )  
                    ) (JURY DEMANDED  
                    ) AS TO CLAIMS TWO  
                    ) AND THREE ONLY)



MARY WAILES, AS )  
SECRETARY )  
OF STATE BAR OF )  
CALIFORNIA; TERRY )  
ANDERLINI, AS PRESIDENT)  
OF STATE BAR OF )  
CALIFORNIA, )  
Defendants. )  
\_\_\_\_\_  
)

GENERAL ALLEGATIONS AS TO CLAIM ONE, TWO

& THREE

I

JURISDICTION

1. This Court's jurisdiction arises under Section 1331 of Title 28, United States Code (as to Claims One and Two), 1343(3)(4) of Title 28, United States Code (as to Claims One and Two); Section 2201 of Title 28, United States Code, FRCP 65 (as to Claim One); Section 411(a)(1), (5)(A)(B)(C), 412 of Title 29, United States Code (as to Claim Three); Section 185(c)(2) of Title 29, United States Code (as to Claim Three), FRCP



8(a) (as to Claim Three, 65 (as to Claim One).

2. Plaintiff brings this action under the provisions of Section 1983 et seq. of Title 42, United States Code, the 14th Amendment to the Constitution of the United States, all as to Claims One and Two. Claim Three arises under the LMRDA [29 United States Code Sections 411(a)(1)(5)(A)(B)(C), 412 and 185(c)(2)].

VENUE

3. This action is brought in the Northern District of California, which is the principal place where Defendants perform their (its) duties, i.e., San Francisco, California.

PARTIES

4. Plaintiff was admitted to the practice of law by the Supreme Court of the State of California on or about June 11, 1946; further events concerning



plaintiff's status are detailed below.

5. Claim One Defendants are now or at all relevant times were a Justice or an Acting Justice of the Supreme Court of the State of California. Claim Two Defendant is and was at all relevant times the Chief Justice of the Supreme Court of California. Claim Three Defendants are the State Bar of California, Mary Wailes, as its Secretary and Terry Anderlini, as its President.

CLAIM ONE - FOR INJUNCTIVE RELIEF

(Against All Justices and Acting Justices of California Supreme Court)

6. In the certain proceedings (herein sometimes "the disciplinary proceedings"), reviewed and adopted by the California Supreme Court (therein designated and numbered as Bar Misc. No. 5256; 72-0-000 1 LA (LA 2235); and LA 32260 Rosenthal v. State Bar of California, Defendants have deprived in



the past, and threaten to continue to deprive plaintiff of his federal civil rights and federal constitutional rights by utilizing unconstitutional statutes (detailed below), including due process and other rights as guaranteed by the 14th Amendment to the Federal Constitution.

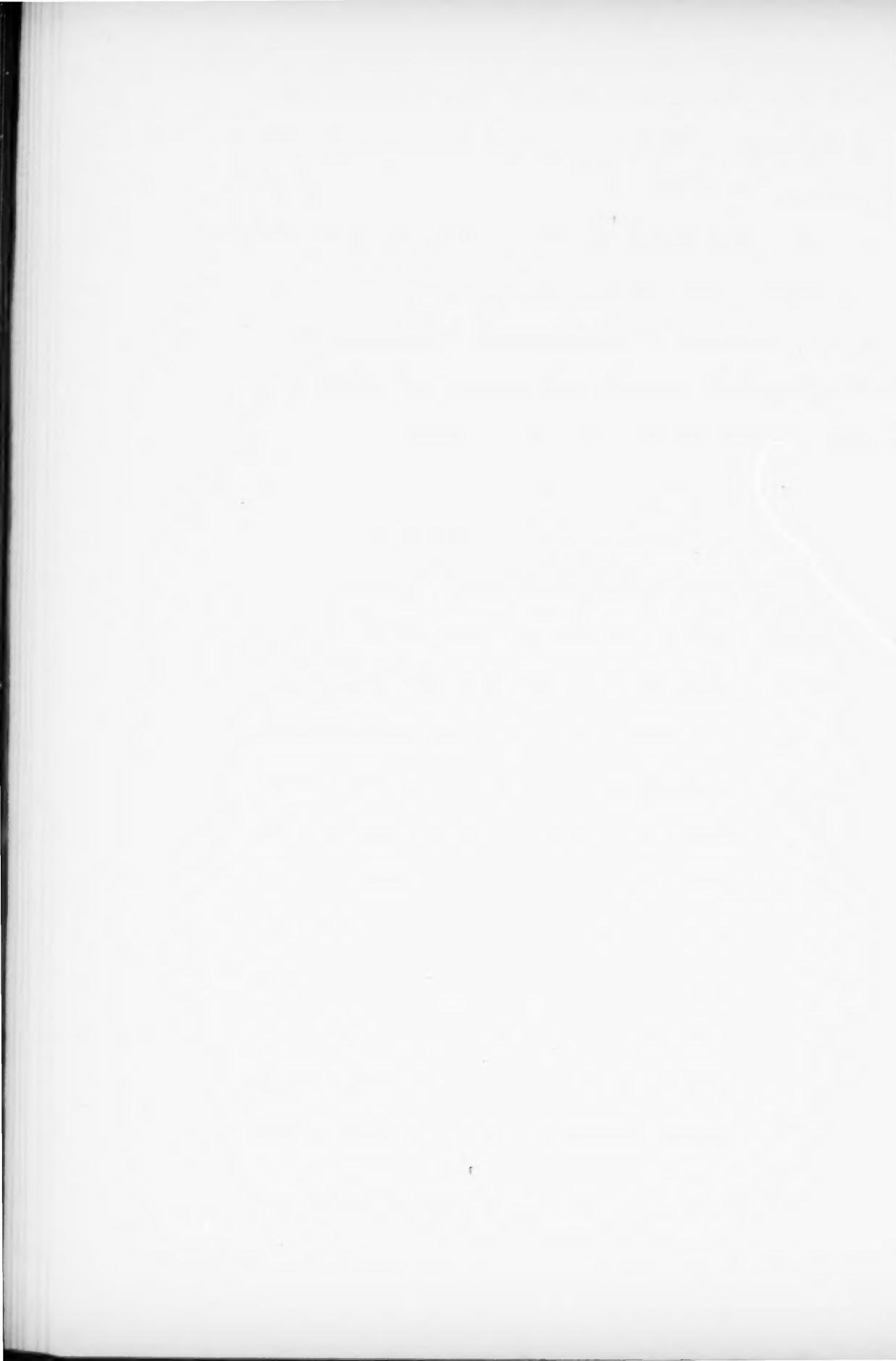
7. In disciplinary cases, these Defendants uniformly act and (except for Lucas) in this case, acted as fact-finders, de novo and make (made) their independent evidentiary determination of disbarment (of Plaintiff) based upon the federally unconstitutional statute, i.e. Section 6083(c) of California Business and Professions Code. That statute unconstitutionally shifts the burden to the accused to prove his/her innocence. See Miller v Norvell (1985) 11 Cir; 775 F.2d 1572, 1576, cert. denied (1986) 90 L.Ed.2d 675; Sandstrom v Montana (1975)



442 U.S. 510, 61 L.Ed. 2d 39; Connecticut v Johnson (1983) 460 U.S. 73, 74 L.Ed.2d 823.

8. The acts threatened by Defendants include, but are not limited to, the enforcement, consistent with their established custom and usage, of Rule 955 Cal. Rules of Court, as follows:

(a) Based upon a facially unconstitutional Statute, i.e., Cal. Business and Professions Code Section 6083(c) which shifts the burden of proof to accused Plaintiff on question of innocence. Casting of that burden upon Plaintiff to overthrow the presumption of intentional wrongdoing embodied in that statute is unconstitutional, in that it requires Plaintiff to overcome a presumption of intentional



wrongdoing or guilt, rather than  
leaving the burden on the  
accuser and the Defendants to  
prove the intentional wrongdoing  
of Plaintiff (accused), as  
charged. This threatened  
action, which is ongoing,  
continuing and prospective, is  
further exacerbated by policy of  
Defendants, acting as Supreme  
Court, to follow and apply the  
provisions of Section 6083(c)  
which is a codified and  
unconstitutional presumption of  
intentional wrongdoing. That  
presumption shifts the burden of  
proof on the issue of intent,  
and therefore violates  
Plaintiff's constitutional  
rights guaranteeing him due  
process under the Fourteenth  
Amendment, and as further



enunciated in Miller v Norvell,  
in Sandstrom v Montana, and in  
Connecticut v Johnson, *supra*.

- (c) Based upon another facially unconstitutional California statute, Business and Professional Code Section 6049.1, the relevant portion of which reads: "In all disciplinary proceedings in this state...conclusions, orders or judgments made or entered in any court of record...shall be admissible in evidence..." The carte blanche admission of opinions, conclusions, and findings of such courts of record into disciplinary proceeding evidence is a denial of due process rights (e.g. confrontation, cross-examination) under the 14th



Amendment. See Berger v California (1969) 393 U.S. 314, 89 S.Ct. 540. See also Gerstein v Pugh (1975) 420 U.S. 103; 95 S.Ct. 854, 43 L.Ed.2d 54, which involved a judgment against state-court judges and a prosecuting official declaring unconstitutional and enjoining the enforcement of certain state statutes. The prosecutor brought the case to the United States Supreme Court, which affirmed the declaration that the Florida procedures at issue were unconstitutional, and held that Younger v Harris (1971) 401 U.S. 37, 56, 57, 27 L.Ed.2d 669, did not bar injunctive relief.

9. The threatened, actual and immediate prospective permanent harm and injury to Plaintiff cannot be adequately



redressed or prevented by an action of law, since the Defendants herein, inter alia, will (unless prevented from doing so by this Court) apply the burden shifting statute B & P 6083(c) and the non-confrontation statute (6049.1) (which are facially unconstitutional in themselves) against Plaintiff, by the threatened acts of enforcement of Defendants' purported disbarment order, including those set forth in the introductory portion of paragraph 8 hereof. As presently threatened, such enforcement (of California Rules of Court, Rule 955) against Plaintiff constitutes the threat of immediate harm in that the final conclusion and action of Defendants is not only threatened and imminent, but also is ongoing and prospective; and the jeopardy springing from such enforcement increases and continues to increase the irreparability



to which the Plaintiff is subjected and will be subjected.

10. In this action Plaintiff does not seek any review, appeal or quasi-appeal of or from, respectively, any final act or decision of the Justice Defendants (whether acting collectively as the California Supreme Court, or otherwise). Instead, Plaintiff seeks (in Claim One hereof) only to enjoin and prevent Defendants from enforcing, as threatened, (by requiring compliance with Rule 955 and otherwise and by threatening to find and punish Plaintiff for contempt) the unconstitutional consequence arising from the Defendants' following of the facially unconstitutional statutes (Sections 6083(c) or 6049.1 of the California Business and Professions Code).

The foregoing allegations in this paragraph 10 constitute these well-



established exceptions to the abstention doctrine of Younger: bad faith, initiating conduct and prosecution of proceedings; harassing and continuing to harass Plaintiff; unusual circumstances calling for equitable relief; and consequent, continuing, ongoing and threatened irreparable injury to Plaintiff.

11. Plaintiff, in the above Claim One of this Complaint:

- (a) has no other adequate means to attain the necessary and desired relief, except as sought herein;
- (b) will be damaged and prejudiced in a way not correctable on appeal in that without granting of relief by this Court, Plaintiff will be increasingly and continually irreparably injured (health,



livelihood, standing) each day  
that sought relief (herein) goes  
ungranted;

(c) has really suffered and  
continues to suffer from the  
often-repeated error of failing  
to distinguish equitable  
situations, from damage  
situations for purposes of  
applying judicial immunity  
principles; and

(d) raises important issue of  
first impression, in attacking  
the unconstitutionality of  
California Statutes (Bus. &  
Prof. Code Sections 6083(c) and  
6049.1 thereof); California  
Supreme Court has ignored  
Plaintiff's constitutional  
attacks and has not previously  
entertained or ruled upon them.

12. Temporary or permanent restraint



or injunction are here appropriate, if not mandated, when this complaint is measured by (contrasted with) the standards articulated in Artukovic v Rison (1986) 784 F.2d 1354, (CCA. 9), as follows:

- (a) Artukovic showed no probability of success on the merits, while Plaintiff has irrefutably demonstrated an extremely high probability of success in the allegations of this complaint;
- (b) While Artukovic presented no serious legal questions, Plaintiff herein has alleged facts which entail profound federal and federal constitutional legal questions of great magnitude and seriousness; and
- (c) While Artukovic was not being subjected to any hardship



because he had an alternative forum available, Plaintiff here requires the intervention of the federal system for the enforcement of his federal rights, to prevent the exacerbation and continuation of the profound hardships suffered, threatened and ongoing as to Plaintiff. Not only is the severe hardship of Plaintiff indisputable, but there is no cognizable public interest in jeopardy if relief is granted, while Plaintiff's hardships are and will be ruinous, and unnecessary, if equitable relief is not granted.

CLAIM TWO - FOR DAMAGES

(Against Defendant Malcolm M. Lucas Only)

13. Plaintiff was admitted to practice before the Supreme Court of the



State of California, and thus to practice law in the State of California, on or about June 11, 1946; at all pertinent times, as explained more fully below, Plaintiff was thus admitted and did thus practice.

14. Defendant Lucas at all pertinent times referred to herein, was (except as otherwise stated below) and now is the Chief Justice of the California Supreme Court.

15. On April 29, 1987 Defendant Malcolm Lucas recused himself as disqualified from further participation in the proceeding (review) of State Bar recommended disbarment of Plaintiff then before the California Supreme Court.

On July 13, 1987, Defendants (all except Defendant Lucas) adopted State Bar's recommended disbarment of Plaintiff and ordered (herein "disbarment order") that Plaintiff comply with Rule

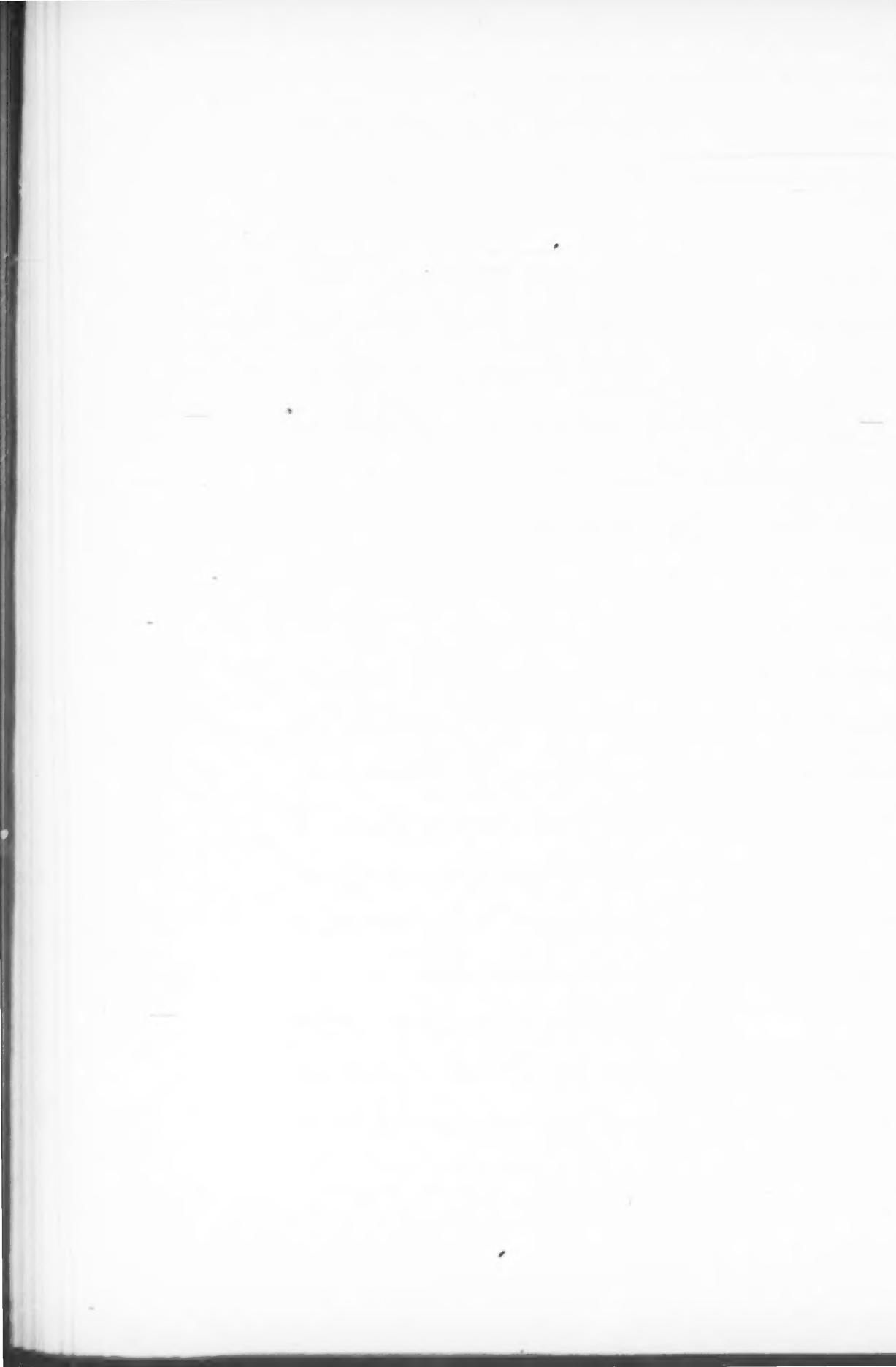


955 (California Rules of Court) by prospectively performing the provisions of subdivisions (a) and (c) of Rule 955.

On September 2, 1987, Defendant Lucas notwithstanding his disqualification and his total lack and absence of any jurisdiction, intentionally and maliciously signed an order denying Plaintiff's petition for rehearing of the disbarment order.

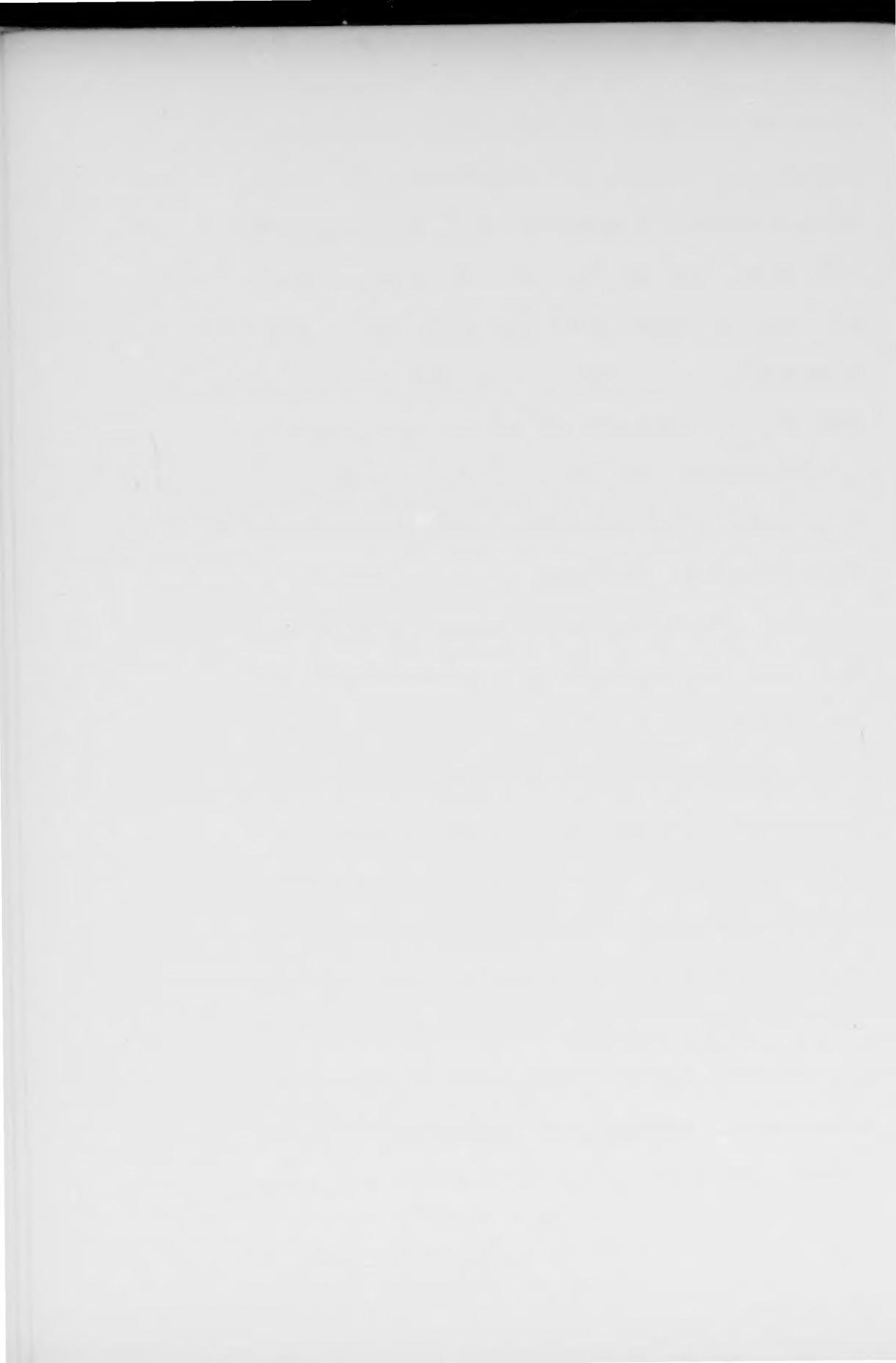
On February 13, 1988 Defendant Arguelles, acting in bad faith and to harass Plaintiff, signed an Order purporting and attempting to support the unlawful act of co-defendant Lucas, by fabricating and manufacturing a retroactive Order which has the effect of depriving Plaintiff of his federal constitutional right to an appeal.

16. Notwithstanding his disqualification and in strict violation thereof, functioning and acting in total



absence of any jurisdiction whatsoever, Defendant Lucas on September 2, 1987, intentionally, fraudulently, deliberately and with the malice aforethought signed, as or purporting to act as "Chief Justice", an Order (purported Order) of and in the Supreme Court of the State of California in bank (sic), denying Plaintiff's petition for rehearing. That Order read as follows:

"Petition for rehearing DENIED." and was signed "Lucas, Chief Justice." In signing that Order and thus participating in the proceedings in which Defendant Lucas had been ordered to refrain from any participation, Defendant Lucas acted and functioned in the clear absence of all jurisdiction, and without any jurisdiction whatsoever, and without any right to the defense of judicial immunity. Please see Forrester v White (1988) 484 U.S. \_\_\_\_; 96 L.Ed.2d 555, 108



S.Ct. \_\_\_\_.

17. As a direct and proximate result of the egregious acts of Defendant Lucas as hereinabove set forth, Plaintiff has suffered and continues to suffer and will continue to suffer for an indeterminate period in the future, severe emotional distress and physical pain arising from and associated with Plaintiff's embarrassment, humiliation, his being subjected to orders of courts requiring him to be disqualified from further representation of clients and pending causes, and further associated with his being charged with misdemeanors, threatened with incarceration, and the loss of his right to pursue his livelihood.

The aforesaid deliberate acts of Defendant Lucas were deliberate, wanton, and done with the knowledge that his such acts would invoke or cause the emotional



distress and physical pain to Plaintiff, or with conscious disregard for such likelihood or certainty, with oppressiveness and malicious motive on the part of said Defendant Lucas, so that Plaintiff is entitled to punitive damages.

18. Said actions on the part of Defendant Lucas were committed by him under color of state law, custom, or usage, and caused Plaintiff to be deprived of rights and privileges secured by the Federal Constitution (due process rights) and laws, all in violation of the Civil Rights Act, 42 USC Section 1983; plaintiff is also entitled to attorney's fees in an award against Defendant Lucas, by reason of said acts of Defendant Lucas, pursuant to said Civil Rights Act, Section 1988 thereof. See Aware Woman v Cocoa Beach (1980) CA 5, 629 F.2d 1146.

CLAIM THREE - FOR REINSTATEMENT,



INJUNCTIVE, AND COMPENSATORY AND PUNITIVE  
DAMAGES

(Against "Organization Defendants":  
State Bar of California (State Bar); Mary  
Wailes, as Secretary of State Bar of  
California; Terry Anderlini, as President  
of State Bar of California)

19. Plaintiff, a resident of the  
State of California, brings this action  
under, and jurisdiction is conferred on  
this Court by the provisions of Title 29,  
U . S . C o d e , S e c t i o n s  
411(a)(1)(5)(A)(B)(C), 412 and 185  
(c)(2), "LMRDA."

20. At all times hereinafter  
mentioned, Plaintiff was (and a dispute  
exists as to whether he still is a member  
of the Organization Defendant, State Bar  
of California, an organization of  
independent contractor-lawyers, the State  
Bar of California is herein referred to  
as "Defendant Organization".



21. The principal office of Defendant Organization is located in San Francisco, California. The violations of the LMRDA hereinafter alleged occurred in California, within the territorial jurisdiction of this Court.

22. Defendant Organization is a "labor organization" within Section 402 of Title 29, U.S.C.S., subdivision (i) thereof, which reads: "'Labor organization' means a labor organization engaged in an industry affecting commerce and includes any organization of any kind...", and is engaged in an industry affecting commerce within the meaning of the LMRDA.

23. Organization Defendants Mary Wailes and Terry Anderlini are, respectively, the Secretary and the President of Defendant Organization and reside within the territorial jurisdiction of this Court.



24. In May, 1986, Plaintiff was notified by Organization Defendant (Review Department) that Organization Defendant unanimously recommended expelling (from membership in Organization Defendant), in direct violation of Plaintiff's rights to a full and fair hearing under Section 411(a)(5) of the LMRDA, in the following particulars:

(a) Organization Defendants deprived Plaintiff of the opportunity to present testimonial and documentary evidence, and required him to bear the burden of showing that he lacked intent to commit the alleged wrongs for which he was expelled as a member of the Organization Defendant;

(b) Organization Defendants intentionally, deliberately and maliciously caused a delay of 18 years, 15 years, and possibly years (various

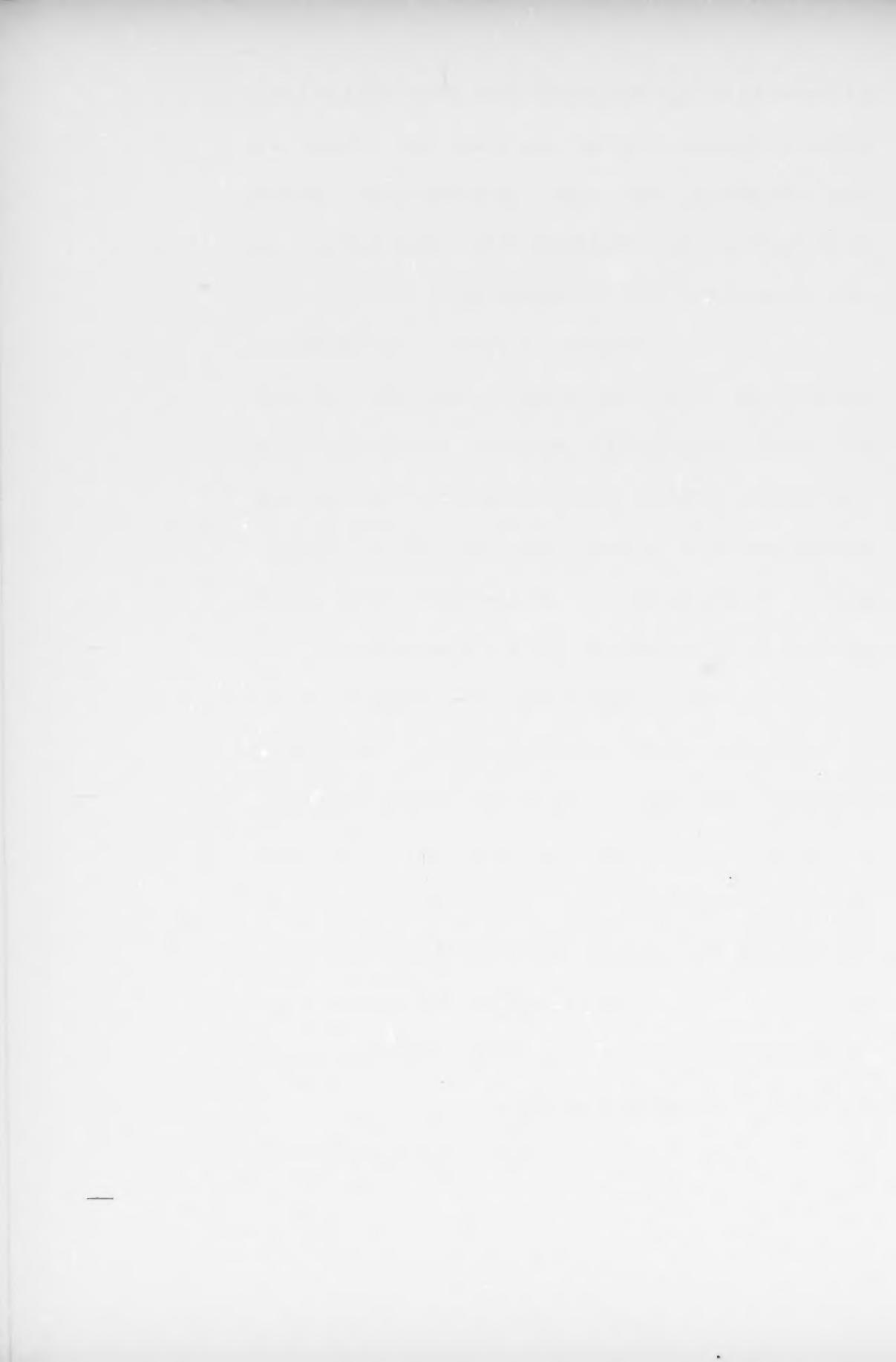


alternative interpretative possibilities, within these three periods of time) in the conduct of the proceedings which culminated in Plaintiff's expulsion by the Organization Defendants;

(c) Organization Defendants permitted its representative who sought to expel Plaintiff member, from one and one-half years within which to review evidence and summarize it in a brief, while according to Plaintiff only four months within which to do the same;

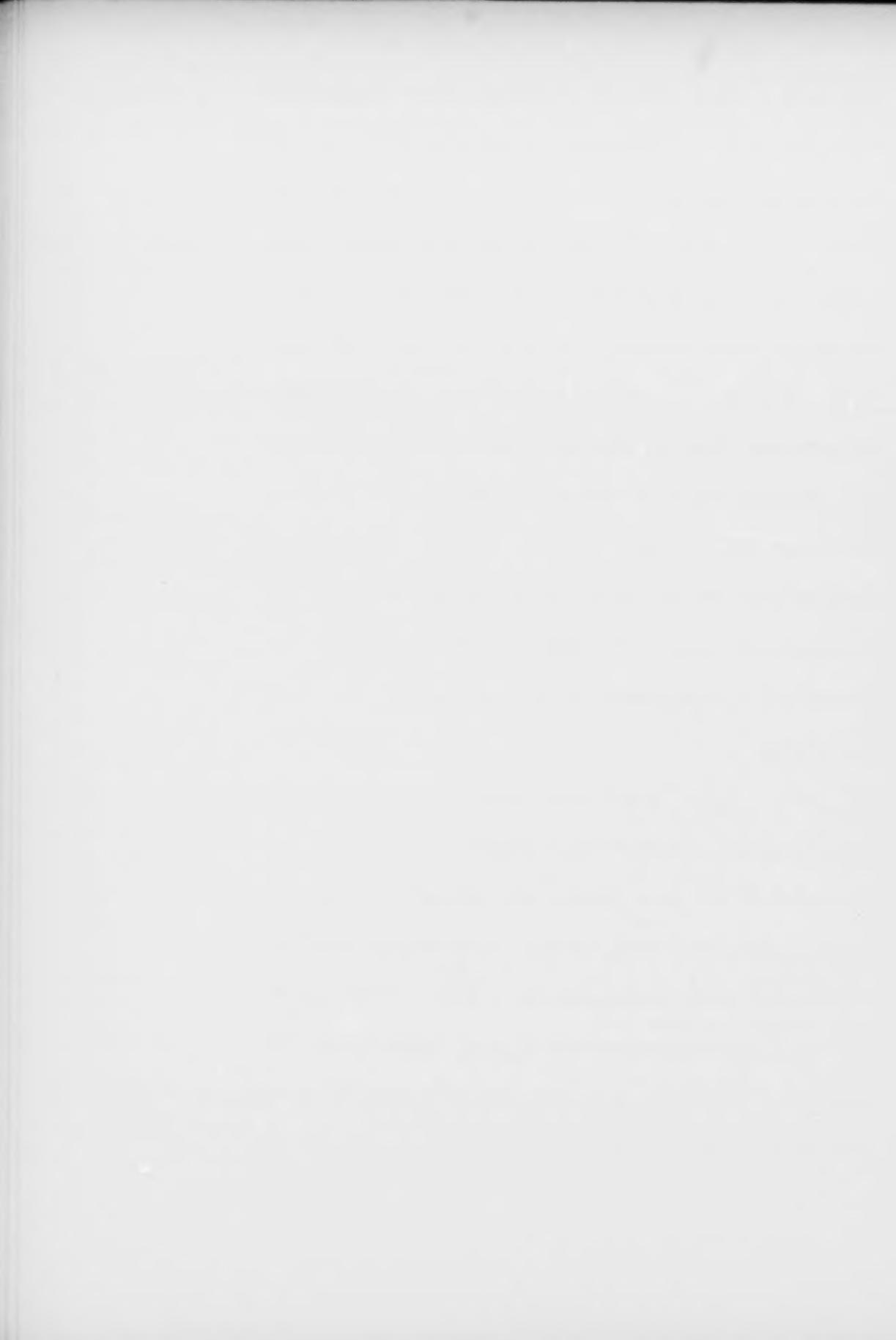
(d) Organization Defendant(s) considered and allowed its "decision makers" to see, examine and inspect, along with its representatives, a certain secret writing, but refused to permit Plaintiff to see or examine that writing, although the writing bore upon the charges resulting in the expulsion of Plaintiff from membership;

(e) Organization Defendant(s)



called and used witnesses against Plaintiff without restraint, used evidence which was unlawful in nature against Plaintiff, while at the same time refusing to permit Plaintiff to cross-examine witnesses, or to bring his own witnesses, and refusing to issue subpoenas for witnesses and for documents or issued such subpoenas and then failed to enforce them, thus again depriving Plaintiff of a full and fair hearing by depriving him of equal opportunity to present witnesses and evidence in his defense;

(f) During the disciplinary proceedings (sometimes herein "trial") of Plaintiff on the charges, which trial was conducted by and under the auspices of Organization Defendant, from virtually the inception of such trial continued to assure and promise to Plaintiff to present evidence, to cross-examine

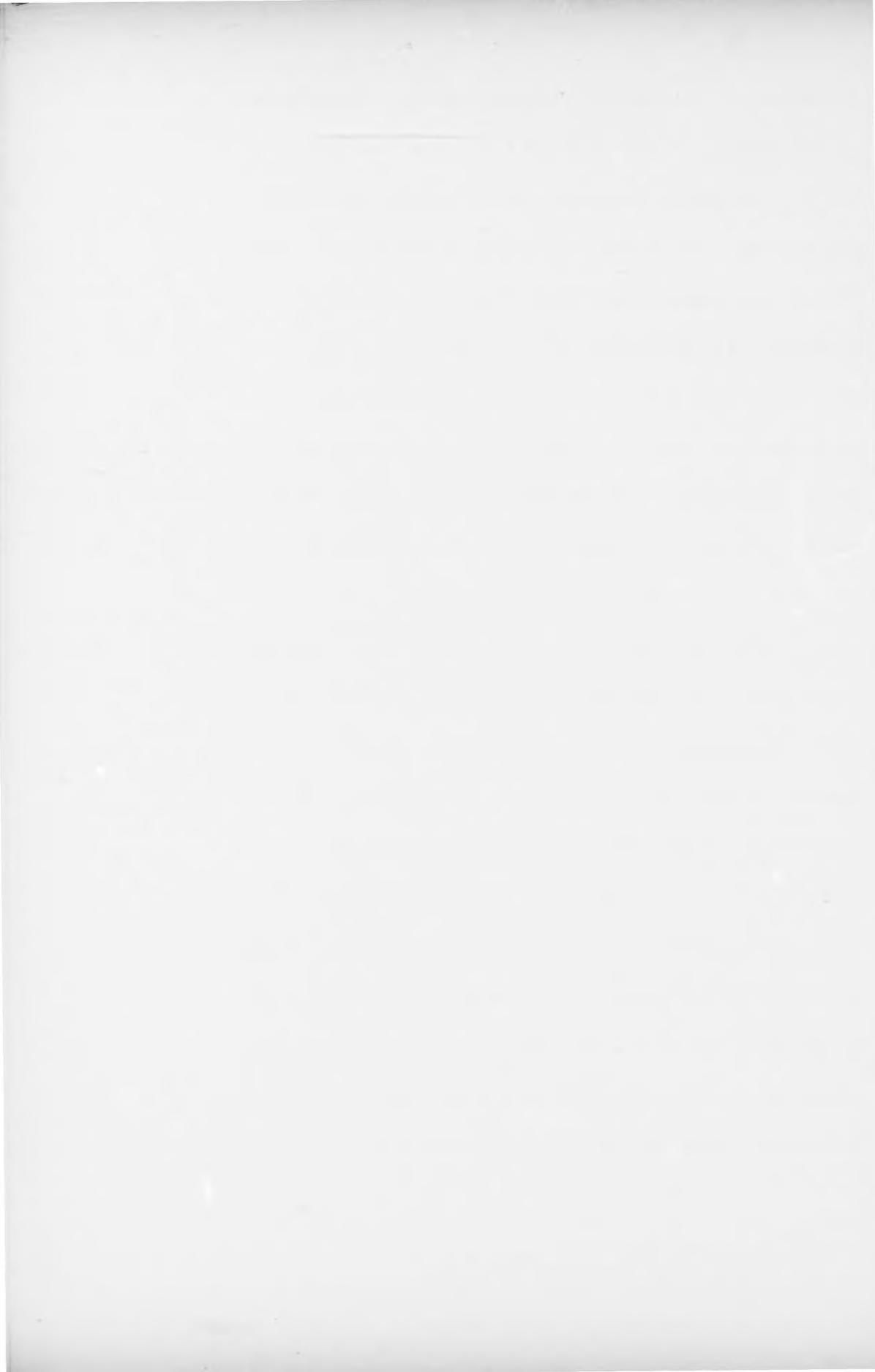


witnesses, to call witnesses, and then, without any statement of reason or ground therefor, reversed and repudiated those promises, reversed themselves and literally prevented Plaintiff from doing the very things that Organization Defendant (through its representatives, of course) had been promising Plaintiff throughout the very proceedings, on which promises and assurances Plaintiff detrimentally relied;

(g) Organization Defendants, acting through their representatives, at trial-like proceedings promised and agreed with Plaintiff that in the future the trial board of Organization Defendant would not read, see, use or admit into evidence certain hearsay evidence, but rather would present (in advance to Plaintiff) certain potentially non-hearsay portions for advance approval or objection. Later Organization Defendants



directly violated those very promises irreparably, by accepting and admitting into evidence hearsay and other unlawful evidence, without giving Plaintiff any right to read, see and approve or object, whether in advance or otherwise. By way of illustration, even though certain witnesses were readily available to Organization Defendant and its trial-like body, those available witnesses were not called or used by Organization Defendant (in asserting its accusations which resulted in the expulsion of Plaintiff), but rather the unlawful evidence described above was admitted into evidence and used by the Organization Defendant, instead of the testimony of the available witnesses, thus depriving Plaintiff of his full and fair hearing rights, particularly those portions inherent in his right to confront, cross-examine, and produce witnesses;



(h) Organization Defendants, particularly its trial-like hearing officials and its prosecutor-like representative, made a determination which resulted in the expulsion of Plaintiff as a member, that Plaintiff was guilty of certain wrongdoing, although no notice of any kind whatsoever had been given to Plaintiff by Organization Defendant and any of its officials, agents, or representatives, of the nature of the charges or accusations to be made against him. As to those "uncharged offenses" of which the Plaintiff was in essence "found guilty", the Organization Defendant thus deprived Plaintiff of his "full and fair hearing" opportunity to prepare witnesses and evidence in his defense;

25. By reason of his expulsion from Organization Defendant through the unlawful acts of Organization Defendants



in direct violation of Plaintiff's rights under the LMRDA Section 411(a)(5)(A)(B)(C), et. seq., Plaintiff has suffered substantial loss and damages as follows:

(a) Plaintiff has been prevented by Defendant from earning a living in the independent-contractor profession of Plaintiff's calling, and plaintiff estimates that by reason of such conduct on the part of Organization Defendant Plaintiff has lost income from his professional practice in the sum of at least \$500,000 up to the time of filing this complaint, and will lose a considerable additional sum in the future;

(b) Plaintiff has also sustained loss and damage as a result of the aforesaid wrongful conduct of Organization Defendant, in the loss of value of some one-half century of



goodwill value of Plaintiff's professional practice, which Plaintiff estimates is worth \$5,000,000, or more according to proof;

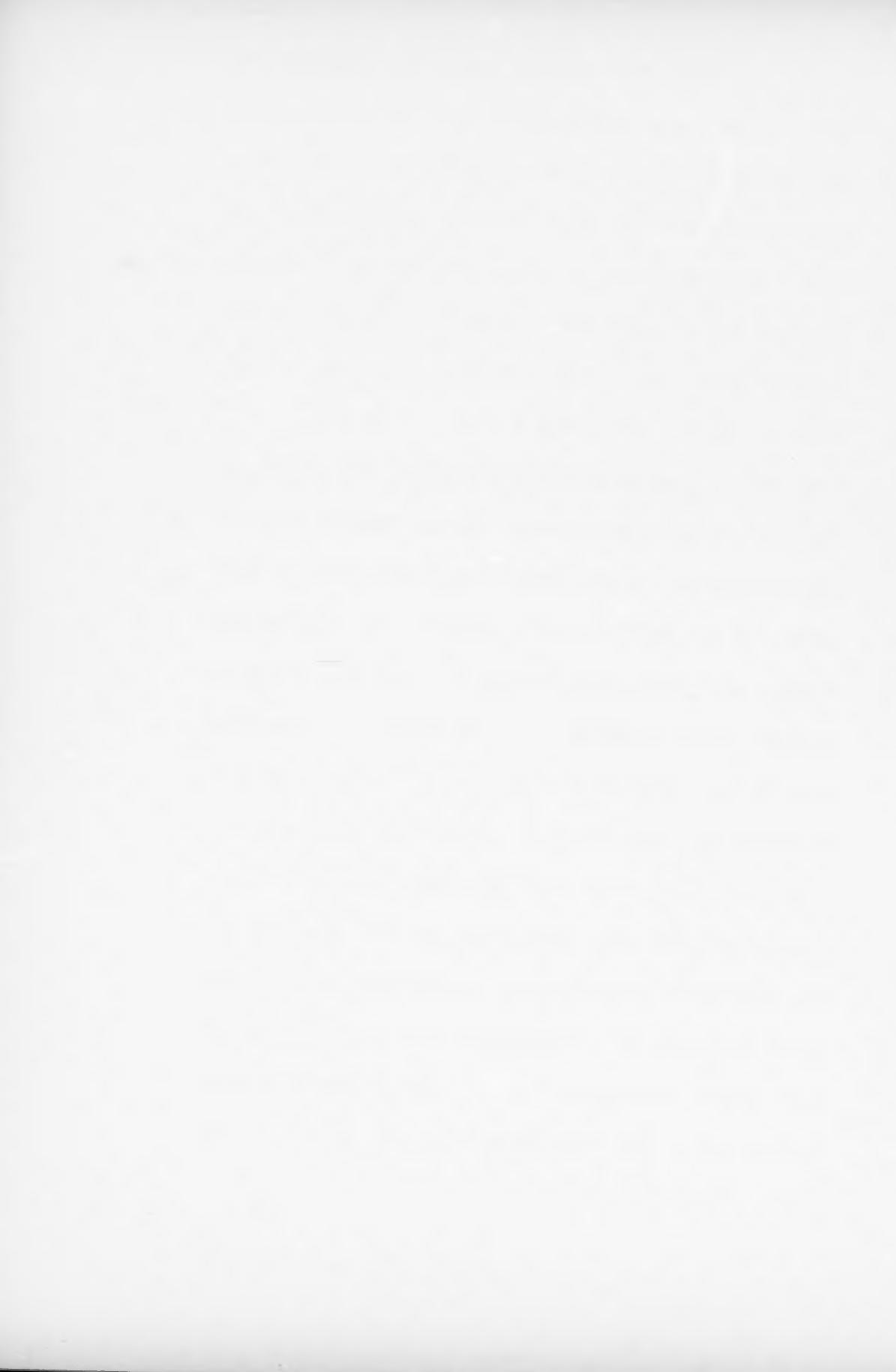
(c) Plaintiff has been shunned and avoided by his former clients and patrons, has been held up to opprobrium by other members of Organization Defendant, has been branded a wrongdoer and blacklisted from further membership which blacklisting has been widely publicized and severely injurious to the standing and reputation as a member, as well as an individual in the community, to Plaintiff's damage in the sum of \$5,000,000;

(d) Plaintiff has as a result of the acts of Organization Defendants as hereinabove alleged, lost his life and related insurance policies as a result of his expulsion by Organization Defendants, as alleged above;



(e) Plaintiff has, by reason of the wrongful expulsion by Organization Defendant, lost his right to vote for representatives and other officials in the Defendant organization, thus depriving Plaintiff of all of the rights inherent in membership in the Organization Defendant.

26. Defendants' actions in causing Plaintiff's expulsion from Organization Defendant(s) were performed willfully and with the malicious intent of injuring Plaintiff and depriving him of his rights under the LMRDA. Plaintiff demands punitive damages against Organization Defendant (State Bar only) in the sum of \$20,000,000; if and to the extent that Secretary and President (Defendants Wailes and Anderlini, respectively) have been active in, condoned, or participated in the wrongful act of Organization Defendant, or ratified it or them (with



knowledge of the wrongful nature of such acts of Organization Defendant), Plaintiff demands damages against the said officers and each of them in the amount of \$10,000,000.

27. By reason of the foregoing allegations, this Court is empowered under the provisions of Section 102 of the LMRDA, Section 412 thereof, to afford Plaintiff appropriate relief.

WHEREFORE, Plaintiff prays and demands relief as follows:

For CLAIM ONE:

A. For an Order of this Court that Defendants ALLEN BROUSSARD, EDWARD PANELLI, JOHN A. ARGUELLES, DAVID EAGLESON, MILDRED LILLIE, VAINO SPENCER, MARCUS KAUFMAN, MALCOLM LUCAS and each of them be enjoined from enforcing in any manner, including but not limited to the enforcement or required compliance (by Plaintiff) with Rule 955 of California



Rules of Court, the Order of July 13, 1987 and the Order of February 18, 1988 of the Justice Defendants acting as California Supreme Court; (reference to the above-named Justice Defendants, also includes persons acting in their stead or for or on behalf of them and each of them);

For CLAIM TWO:

A. For an award of consequential damages against Defendant Lucas, in the sum of \$2,000,000, or more, according to proof;

B. For exemplary and punitive damages against said Defendant Lucas, in the amount of \$5,000,000 or more, according to proof;

C. For attorney's fees, in an award against said Defendant Lucas, in the amount of \$250,000, or a reasonable amount as determined by this Court; and

For CLAIM THREE:



A. That this Court declare the proceedings taken by the Organization Defendant in connection with and during Plaintiff's trial or proceedings as alleged above, infringed Plaintiff's rights under the provisions of the LMRDA, and that, therefore, the recommended expulsion of Plaintiff member be declared null and void, and Organization Defendant be required to recommend or cause reinstatement of Plaintiff as a member;

B. As an alternative to A. immediately above, that this Court order Organization Defendant to grant a new disciplinary proceeding to Plaintiff (de novo), and afford therein a full and fair hearing (reference to the Organization Defendant herein also includes persons and other organizations acting in concert with, on behalf of, and in furtherance or execution of policies or determinations of Organization Defendant).



C. That, pending the trial of this cause, and on rendition of final judgment herein, this Court enjoin Defendant Organization, its agents, representatives, instrumentalities and officials from interfering with the exercise by Plaintiff of his rights as a member (like any other member in good standing) of Organization Defendant (State Bar of California), and from violating Plaintiff's rights under Section 101(a)(5) of the LMRDA (29 U.S.C. Section 401(a)(5)).

D. 1. Compensatory damages against Organization Defendant (State Bar of California only) of \$500,000 sustained up to filing of this Complaint, and additional thereafter, according to proof (Par. 25(a) above);  
2. Compensatory damages against Organization Defendant (State



Bar of California only) of \$5,000,000 or more, according to proof (Par. 25(b) above);

3. Compensatory damages against Organization Defendant (State Bar of California only) of \$5,000,000 (Par. 25 (c) above);

4. Compensatory damages against Organization Defendant (State Bar of California only), in amounts according to proof (Par. 25(d) and (e));

5. Punitive damages against Organization Defendant (State Bar of California) of \$20,000,000 (Par. 26);

6. Punitive damages against Mary Wailes and Terry Anderlini and each of them, conditionally, of \$10,000,000 (Par. 26 above).

E. As to Claim One, Claim Two, and Claim Three, such further and other



relief as this Court may deem equitable  
and proper.

Dated: July 22, 1988.

---

Jerome B. Rosenthal  
Plaintiff pro se



## APPENDIX

<u>No.</u>	<u>Description</u>
------------	--------------------

- |     |  |
|-----|--|
| 16. | Order Denying Rehearing, U.S. Court<br>of Appeals, Ninth Circuit, September<br>2, 1987 |
|-----|--|



September 11, 1987

ORDER DENYING REHEARING

L.A. No. 32260

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT

F I L E D

SEP 2, 1987

JEROME B. ROSENTHAL,  
Petitioner

L...P. Gill, Clerk

v.

DEPUTY

STATE BAR OF CALIFORNIA,  
Respondent

Petition for

rehearing DENIED.

(S) Lucas  
Chief Justice



APPENDIX

<u>No.</u>	<u>Description</u>
17.	Order, California Supreme Court, May 27, 1987, Recusing Lucas, C.J.



SUPREME COURT

FILED

MAY 27, 1987

Laurence P. Gill, Clerk

Deputy

No. L.A. 32260

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

---

JEROME B. ROSENTHAL

v.

STATE BAR OF CALIFORNIA

---

Petitioner's objection to the continued participation of Chief Justice Lucas having been presented to him, the Chief Justice on April 29, 1987, recused himself from further participation in this proceeding.

(S) Panelli J.  
Acting Chief Justice

90-942  
2

No.

IN THE SUPREME COURT OF THE  
UNITED STATES

Supreme Court, U.S.  
FILED

DEC 10 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

October Term, 1990

JEROME B. ROSENTHAL,

Petitioner,

vs.

"JUSTICE DEFENDANTS", and  
"ORGANIZATION DEFENDANTS"  
(Full listing of all parties  
appears in this Petition, p.vi)

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS,  
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

(Appendices 1 - 17, in accompanying,  
separate volume)

JEROME B. ROSENTHAL  
6535 Wilshire Blvd.  
Suite 800  
Los Angeles, CA 90048  
(213) 658-6411  
(213) 658-6778

Petitioner, Pro Se



No.

IN THE SUPREME COURT OF THE  
UNITED STATES

October Term, 1990

JEROME B. ROSENTHAL,

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(213) 658-6778

Petitioner, Pro Se



QUESTIONS PRESENTED FOR REVIEW

1. Are the constitutional (federal) rights of confrontation and cross-examination, and of the presumption of innocence guaranteed and available to the "accused" in quasi-criminal proceedings (as they are in criminal proceedings)?
  
2. When highest court of state (California Supreme Court) functionally acts as an original trial court (in lawyer-discipline proceedings) is a state statute which, before that Court, shifts the burden of proof of innocence to the "accused" (denying accused his



right to presumption of innocence and imposing on him the burden of overcoming a presumption of intentional wrongdoing) facially unconstitutional in violation of due process rights under the 14th Amendment (U.S.)?

3. Is a state statute which permits the admission into evidence (in a lawyer-discipline proceeding) copies of "findings, conclusions...entered in any court of record" and under which "accused" lawyer has no opportunity to be confronted by or to cross-examine the "author" of the "findings, conclusions..." unconstitutional in violation of 6th and 14th Amendments (U.S.)



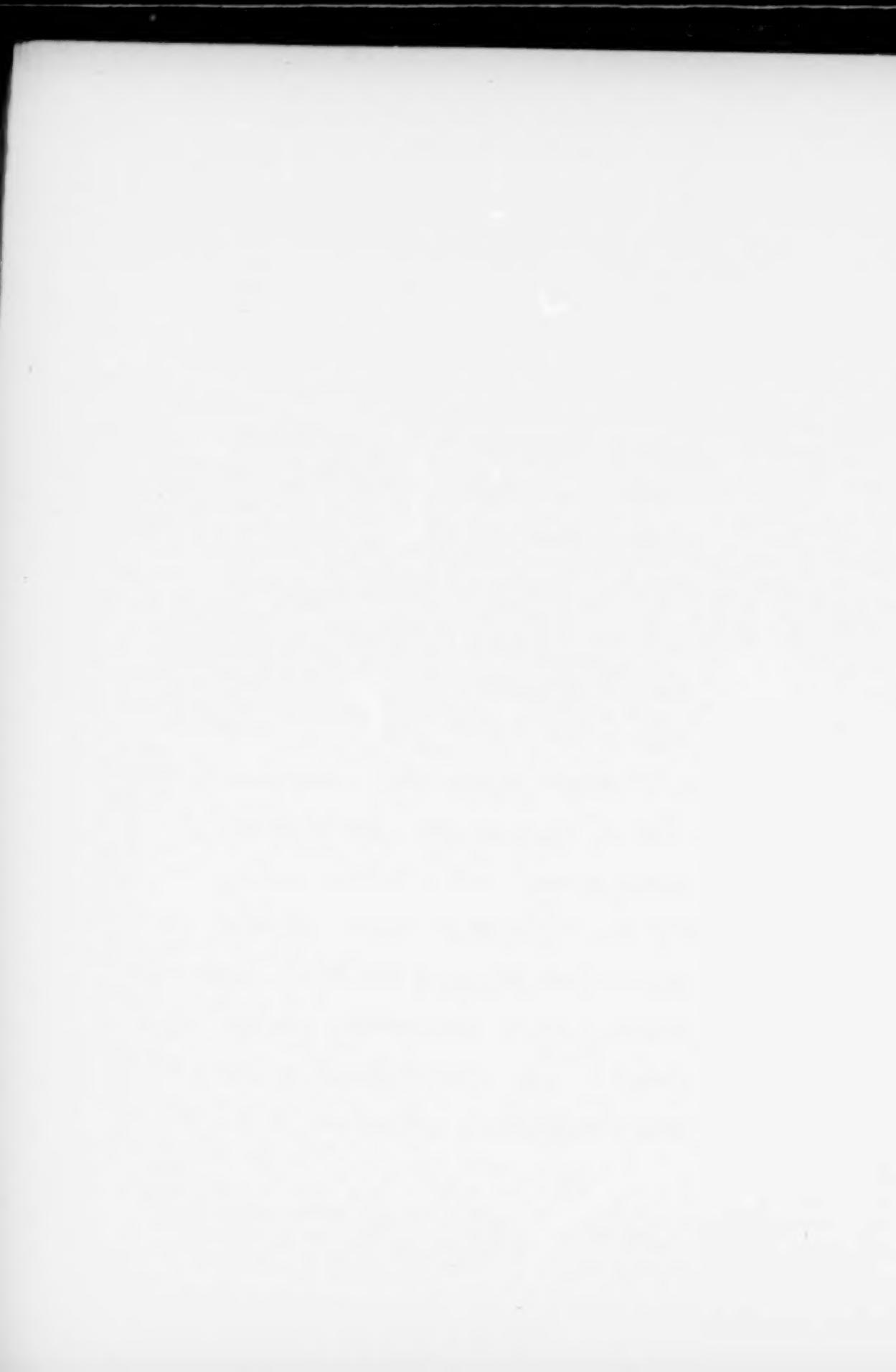
confrontations/cross examination  
rights and due process  
provisions, respectively?

4. Does a justice of a state's highest Court, who, having invited parties' objection, and upon receiving objection of Petitioner, recused himself from any further participation in a proceeding, who later issues and signs a final and dispositive order in that proceeding, in so doing act in the absence of any, or merely in excess of, jurisdiction? In which, if either event, does the justice lose his judicial immunity, and become liable for damages to plaintiff in 42 U.S.C. 1983 Civil Rights case? (Appendix 3)



5. Are integrated state bar organizations (like California State Bar) "labor organizations", under the Labor Management Reporting and Disclosure Act ("LMRDA") (29 U.S.C. Section 402 et seq.) which requires such organization(s) to provide a "full and fair hearing" before disciplining or expelling a member (lawyer)?

6. Where state law conflicts with or impedes the operation of federal law, e.g., LMRDA, (when both federal and state principles regulate conduct), is state action preempted, or is federal law controlling under the Supremacy Clause, U.S.



Constitution Article VI, Section  
2?

7. Where suit is brought in Federal Court seeking to enforce plaintiff's federal constitutional rights in general challenges of state statutes' federal constitutionality, does Federal (District) Court lack subject-matter jurisdiction, where plaintiff does not seek review of any decision of state's highest Court in a Bar matter?



LIST OF PARTIES

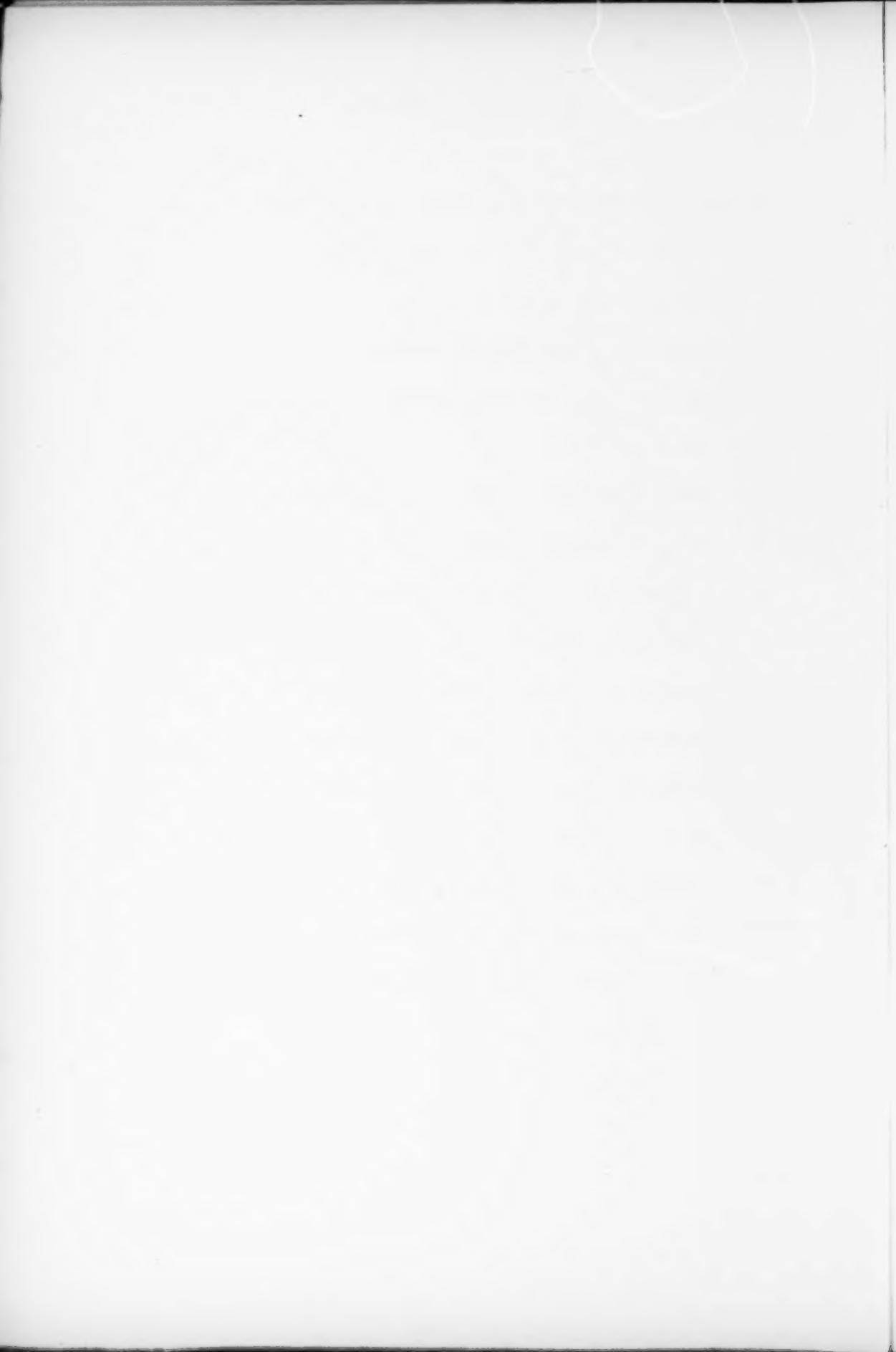
Appellant/Petitioner: JEROME B.  
ROSENTHAL

Defendants/Appellees: "JUSTICE DEFENDANTS": JUSTICES OF THE SUPREME COURT OF CALIFORNIA, ALLEN BROUSSARD, ACTING CHIEF JUSTICE; AND HONORABLE EDWARD PANELLI, HONORABLE JOHN A. ARGUELLES, HONORABLE DAVID N. EAGLESON, HONORABLE MILDRED LILLIE, HONORABLE VAINO SPENCER, HONORABLE MARCUS KAUFMAN, JUSTICES; MALCOLM M. LUCAS, CHIEF JUSTICE; "ORGANIZATION DEFENDANTS": STATE BAR OF CALIFORNIA MARY WAILES, SECRETARY OF STATE BAR OF CALIFORNIA; TERRY ANDERLINI, PRESIDENT OF STATE BAR OF CALIFORNIA.



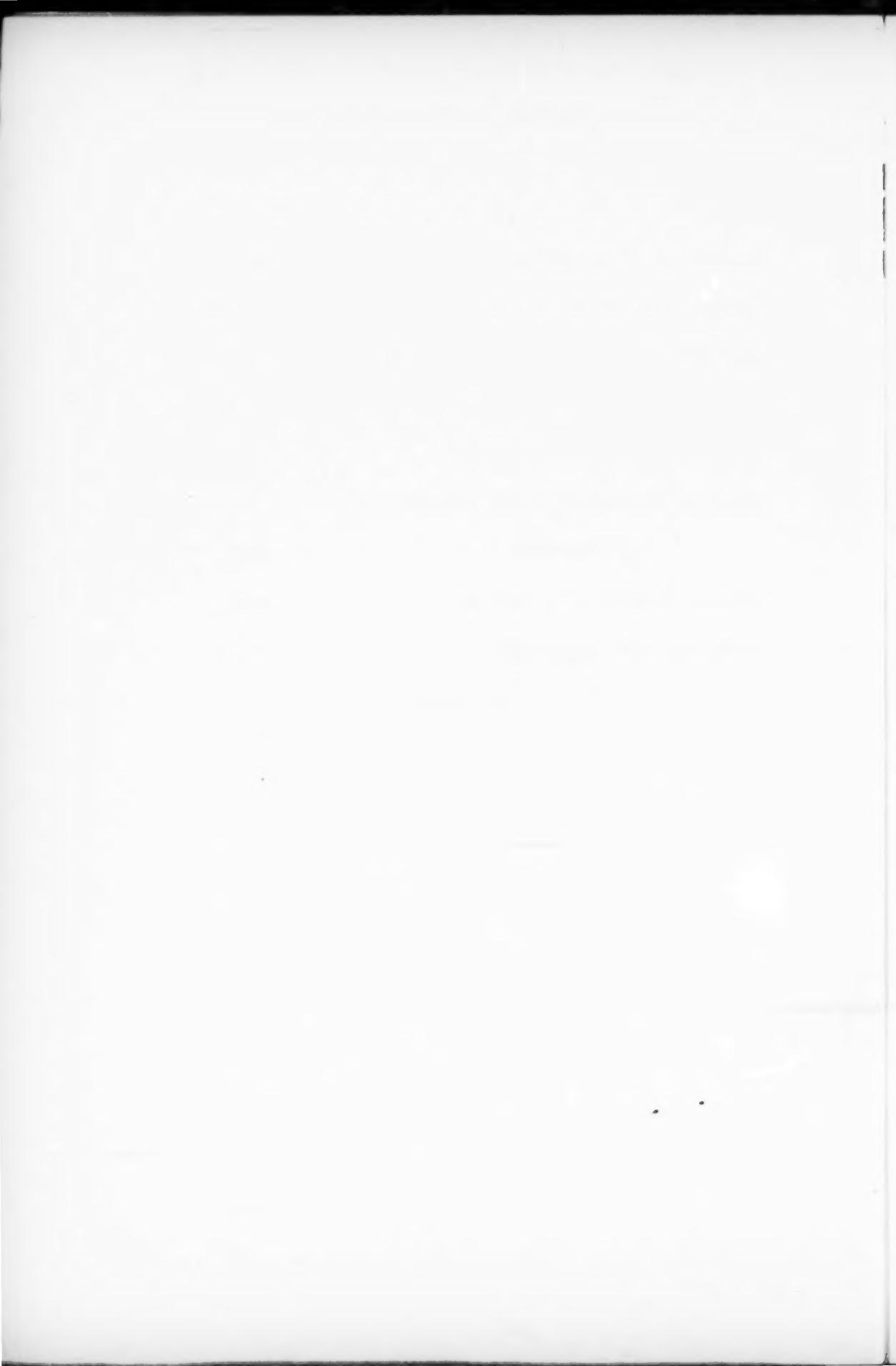
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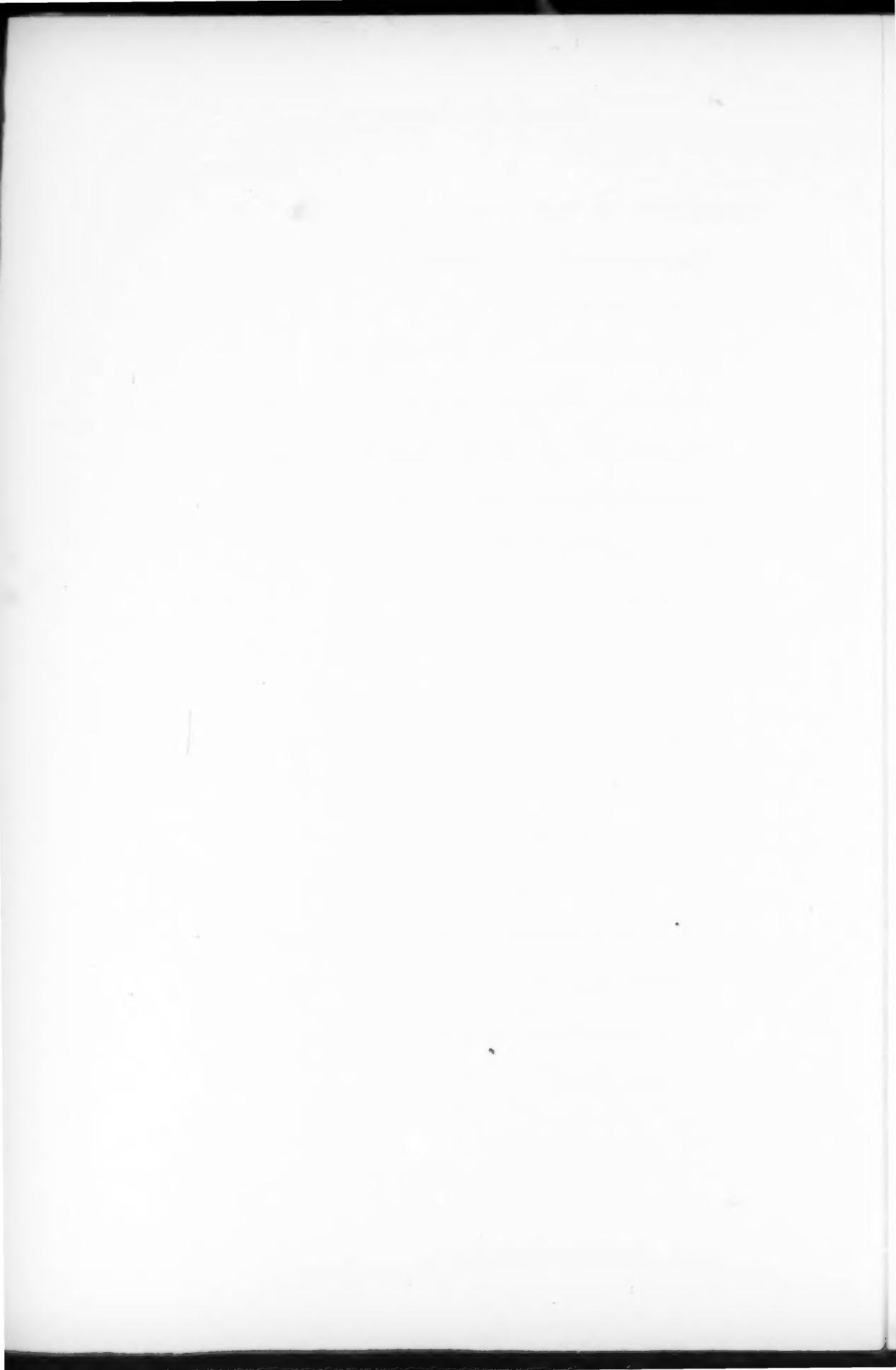
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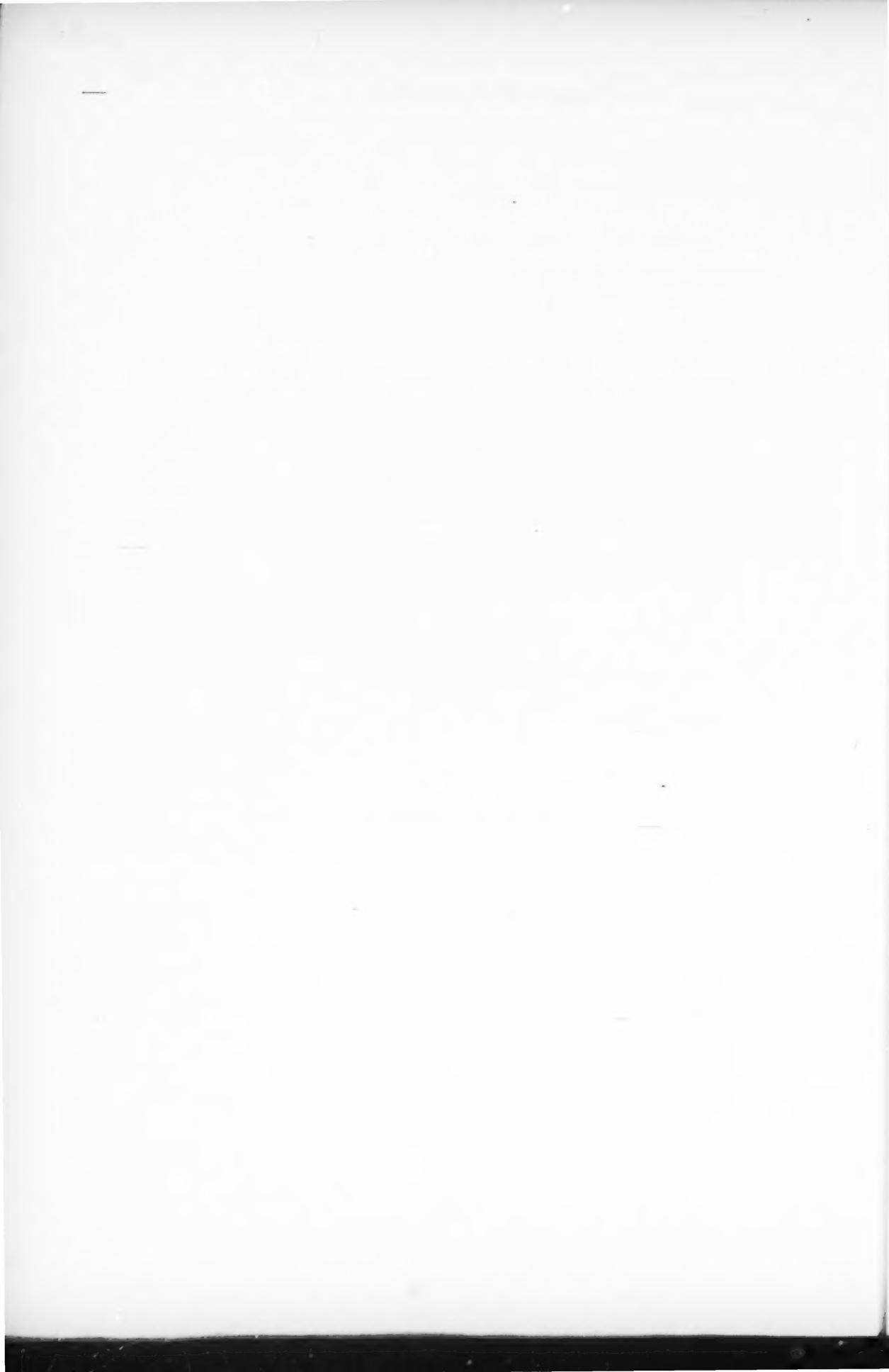
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DELIVERED IN THE CASE

1. - Order, November 21, 1988, U.S. District Court, N.D.Cal., Case No. C 87-3104 TEH, Dismissing Plaintiff's (here Petitioner) case with prejudice. (See Appendix 6)
  
2. - Opinion, in Rosenthal (here Petitioner) v. Justices of The Supreme Court of California, U.S. Court of Appeals, Ninth Circuit, August 1, 1990, affirming District Court (1. above) 910 F.2d 561 (9th Cir., 1990) (Appendix 7)
  
3. -Order, U.S. Court of Appeals, Ninth Circuit, September 10, 1990 denying Appellant's (here Petitioner's) Petitioner for Rehearing - (Appendix 8).



GROUND ON WHICH JURISDICTION  
OF THIS COURT IS INVOKED

Date of entry of Judgment (Opinion of the  
United States Court of Appeals For The  
Ninth Circuit: August 1, 1990)

Date of Order of U.S. Court of Appeals,  
Ninth, denying Petition for Rehearing:  
September 10, 1990

STATUTORY PROVISION

The jurisdiction of the Court is invoked  
under 28 U.S.C. Sections 1254 and  
1257(c).

CONSTITUTIONAL PROVISIONS, STATUTES

1. U.S. Constitution, 6th Amendment  
Appendix 2



2. U.S. Constitution, 14th Amendment

Appendix 1

3. Civil Rights Act, 42 U.S.C. 1983

Appendix 3

4. Labor Management Reporting and  
Disclosure Act, 29 U.S.C. Section 402(i)

Appendix 9

29 U.S.C. Section 411(a)(5)

Appendix 10

**STATE STATUTES, RULES**

5. California Bus. & Prof. Code, Section  
6049.1 Appendix 11

6. California Bus. & Prof. Code, Section  
6083(c) Appendix 12

7. California Rule of Court, Rule 955  
Appendix 13



## LIST OF APPENDICES

<u>No.</u>	<u>Description</u>
1.	14th Amendment - U.S. Constitution
2.	6th Amendment - U.S. Constitution
3.	42 U.S.C. Section 1983
4.	(Intentionally omitted)
5.	U.S. Constitution, Article VI, Section 2
6.	Order, United States District Court dismissing FASC, November 21, 1988
7.	Opinion, U.S. Court of Appeals, Ninth Circuit, dated August 1, 1990
8.	Order, U.S. Court of Appeals, Ninth Circuit, September 10, 1990, Denying Petitioner's Petition for Rehearing
9.	29 U.S.C. Section 402(i)
10.	29 U.S.C. Section 411(a)(5)
11.	California Business and Professions Code, Section 6049.1
12.	California Business and Professions Code, Section 6083(c)
13.	California Rules of Court, Rule 955
14.	Order, U.S. Court of Appeals, April 1988
15.	First Amended and Supplemental Complaint (FASC)



**LIST OF APPENDICES (Cont'd)**

16. Order Denying Rehearing, U.S. Court of Appeals, Ninth Circuit, September 2, 1987
17. Order, California Supreme Court, May 27, 1987, Recusing Lucas, C.J.



No.

IN THE SUPREME COURT OF THE  
UNITED STATES

October Term, 1990

JEROME B. ROSENTHAL,

Petitioner,

vs.

"JUSTICE DEFENDANTS", and  
"ORGANIZATION DEFENDANTS"  
(Full listing of all parties  
appears in this Petition, p.6)

Respondents.  
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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS,  
FOR THE NINTH CIRCUIT  
-----

PETITION FOR CERTIORARI  
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STATEMENT OF THE CASE

After Petitioner's disbarment by California Supreme Court in 1987, and this Court's ruling "no jurisdiction", Petitioner filed suit in the U.S. District Court, N.D. California. On appeal from District Court's order dismissing Petitioner's complaint, Court of Appeals (9th Cir.) reversed and remanded (April 29, 1988) holding, inter alia, that to the extent that Petitioner's Complaint presented "a facial challenge to the constitutionality of Section 6083(c) requiring the district court to independently assess the validity of the rule, rather than review the final judgment of the state court, the court had subject-matter jurisdiction over the complaint." (Appendix 14)

Petitioner, as plaintiff filed First Amended and Supplemental Complaint ("FASC"), July 26, 1988, U.S. District



Court, Northern District of California (Appendix 15), stating three claims.

Claim One: against Justices of the California Supreme Court, alleging that Justice Defendants had deprived, were depriving and threatened to continue to deprive Petitioner of his federal civil and constitutional rights by utilizing facially, federally unconstitutional state statutes. Petitioner sought to restrain Justice Defendants from continuing and future enforcement of these state statutes: (1) California Business and Professions Code, Section 6083(c), (Appendix 12) a burden-shifting statute which Petitioner alleged deprived him of the presumption of innocence and concomitantly imposed on him the burden of establishing his freedom from guilt of wrongdoing (2) Business and Professions Code Section 6049.1, (Appendix 11) on the alleged ground that it deprived him of



rights of confrontation and cross-examination.

FASC, Para. 10 alleged that Petitioner "does not seek any review, appeal or quasi-appeal of or from, respectively any final act or decision of the Justice Defendants (whether acting collectively as the California Supreme Court, or otherwise). Instead, plaintiff seeks (in Claim One hereof) only to enjoin and prevent (Justice) Defendants from enforcing, as threatened (by requiring compliance with Rule 955 and otherwise and by threatening to find and punish Plaintiff for contempt) the unconstitutional consequence arising from Defendants' following of the facially unconstitutional statutes...." FASC further alleged (Appendix 15) that the Defendant Justices of the California Supreme Court had ignored Plaintiff's constitutional attacks on Sections



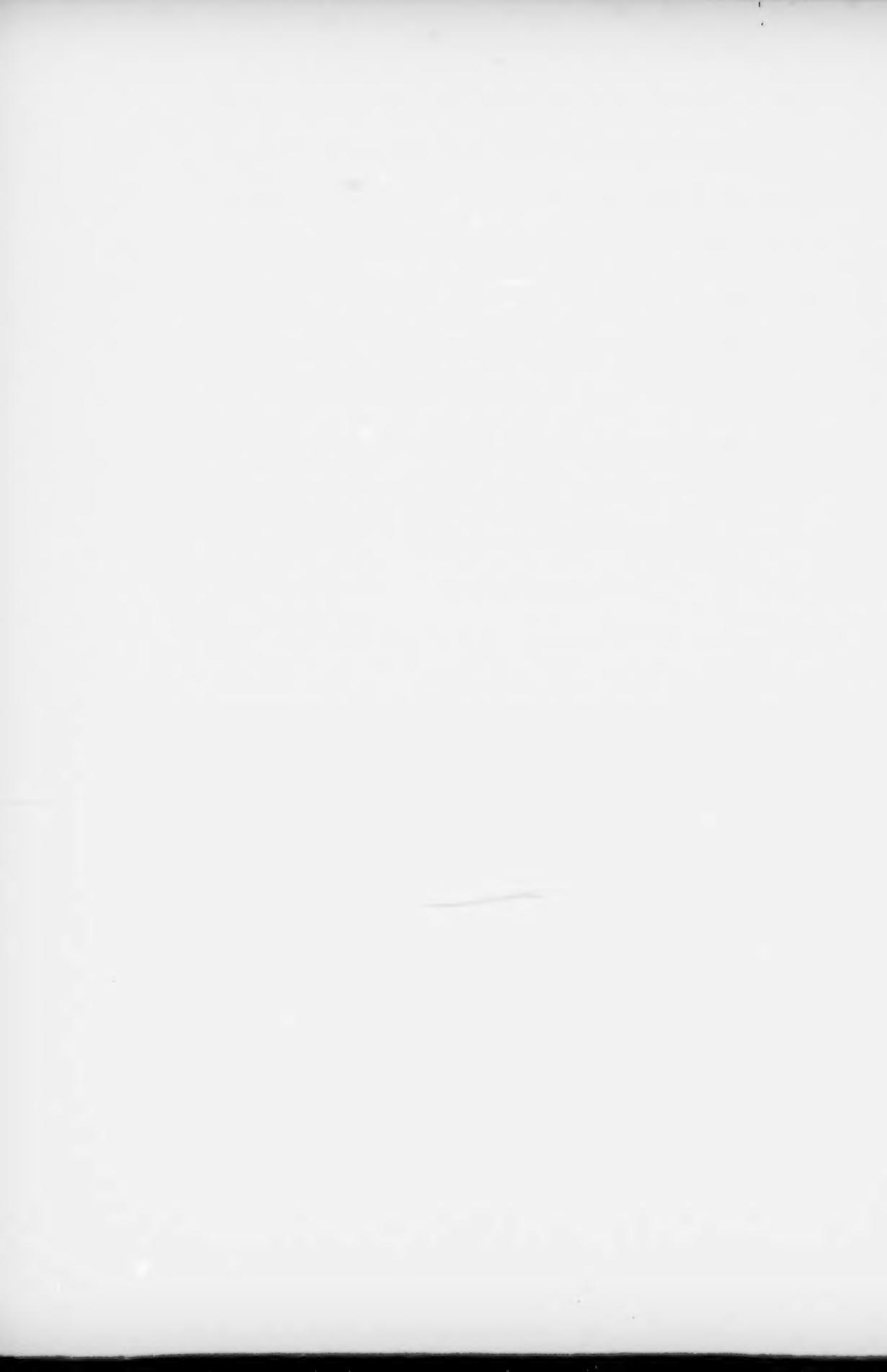
6083(c) and 6049.1, and had not  
thentofore entertained or ruled upon  
them.

Claim Two: for damages against  
Chief Justice Hon. Malcolm M. Lucas on  
the ground that after the Honorable  
Justice Lucas had recused himself  
(Appendix 17) "as disqualified from  
further participation in the proceeding  
(review) of State Bar recommended  
disbarment of plaintiff then before the  
California Supreme Court, Defendant Lucas  
"notwithstanding his disqualification and  
his total lack and absence of any  
jurisdiction" on September 2, 1987,  
(Appendix 16)... "intentionally and  
maliciously signed an order denying  
plaintiff's petition for rehearing of the  
disbarment order." FASC further alleged  
that the actions of defendant Lucas were  
committed by him under color of state  
law, custom or usage, causing plaintiff



(petitioner) to be deprived of rights and privileges secured by due process rights of the federal constitution and federal laws, seeking consequential and punitive damages.

Claim Three: sought injunctive relief and compensatory and punitive damages against Organization Defendants (State Bar of California, its secretary and its president) alleging that those defendants had unanimously recommended expelling petitioner (from membership in Organization Defendant) in direct violation of plaintiff's rights to a full and fair hearing under the Labor Management Reporting and Disclosure Act, and further alleging that Organization Defendant (State Bar) is a "labor organization" under Section 402 of Title 29 U.S.C. subdivision (i). FASC (Appendix 15) details allegations showing



facts constituting "denial of full and fair hearing."

[The basis for federal jurisdiction in the U.S. District Court is as follows:

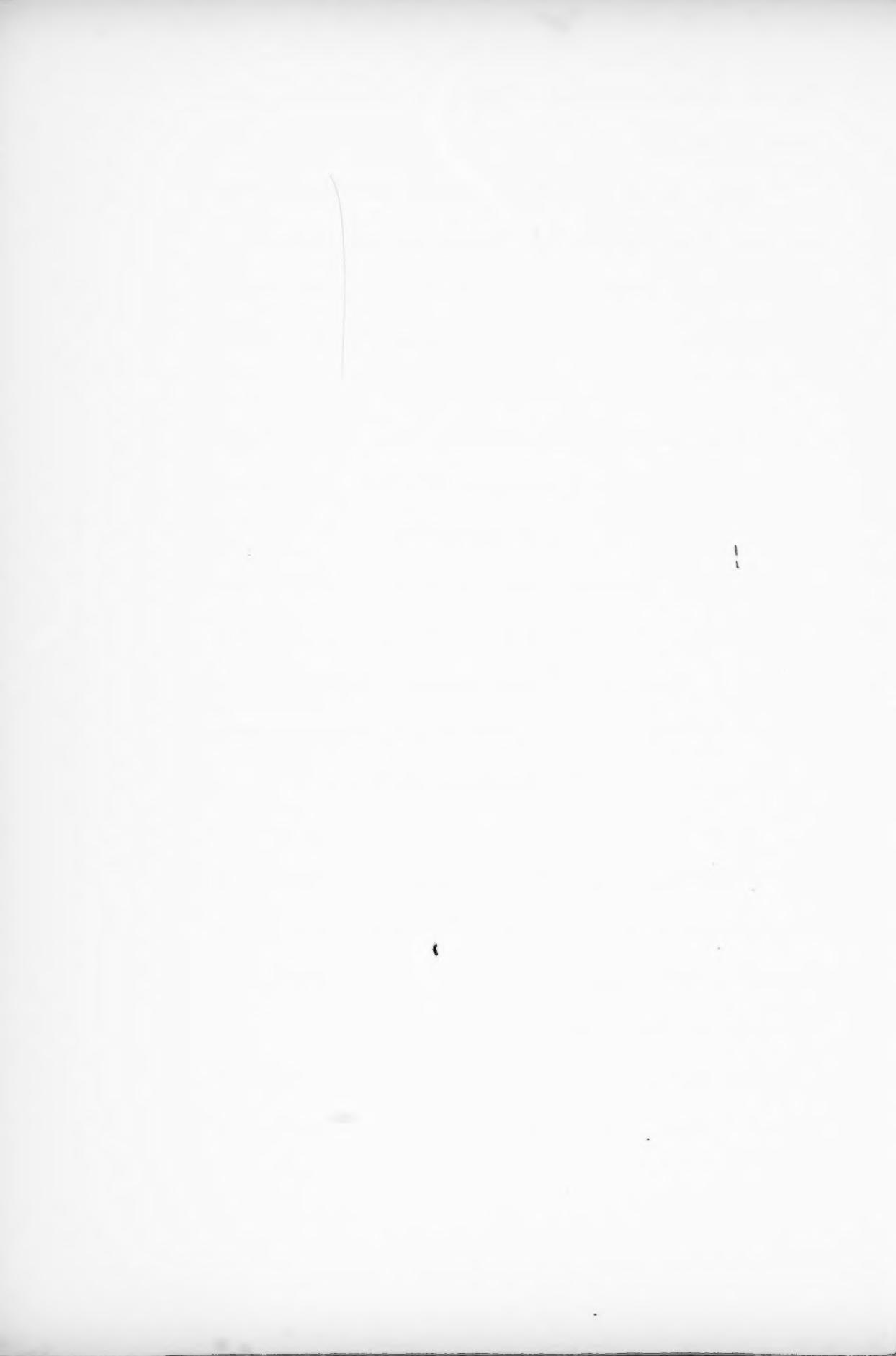
-Claim One: 28 U.S.C. Section 2201, and FRCP, Rule 65.

-Claims One and Two: 28 U.S.C. Section 1331, 1343(3)(4).

-Claim Three: 29 U.S.C. Section 185(c)(2), and Sections 411(a)(1), (5)(A)(B)(C), and Section 412.]

Both groups of defendants ("Justice Defendants" and "Organization Defendants") made motions to dismiss the action in the complaint.

On November 21, 1988, U.S. District Court dismissed all three claims of



plaintiff's (petitioner's) First Amended  
and Supplemental Complaint. Order.  
(Appendix 6)

NOTE: Because the District Court's November 21, 1988 Order dismissed the case and complaint under FRCP 12(b)(6), the allegations of the FASC are, to the extent well-pleaded, are treated as true.

Hospital Bldg. Co. v Trustees, 425 U.S. 738. Those allegations may well be indispensable to this Court's consideration of this Petition. Accordingly the "First Amended and Supplemental Complaint (FASC) is set forth verbatim, as Appendix 15, for this Court's convenience.

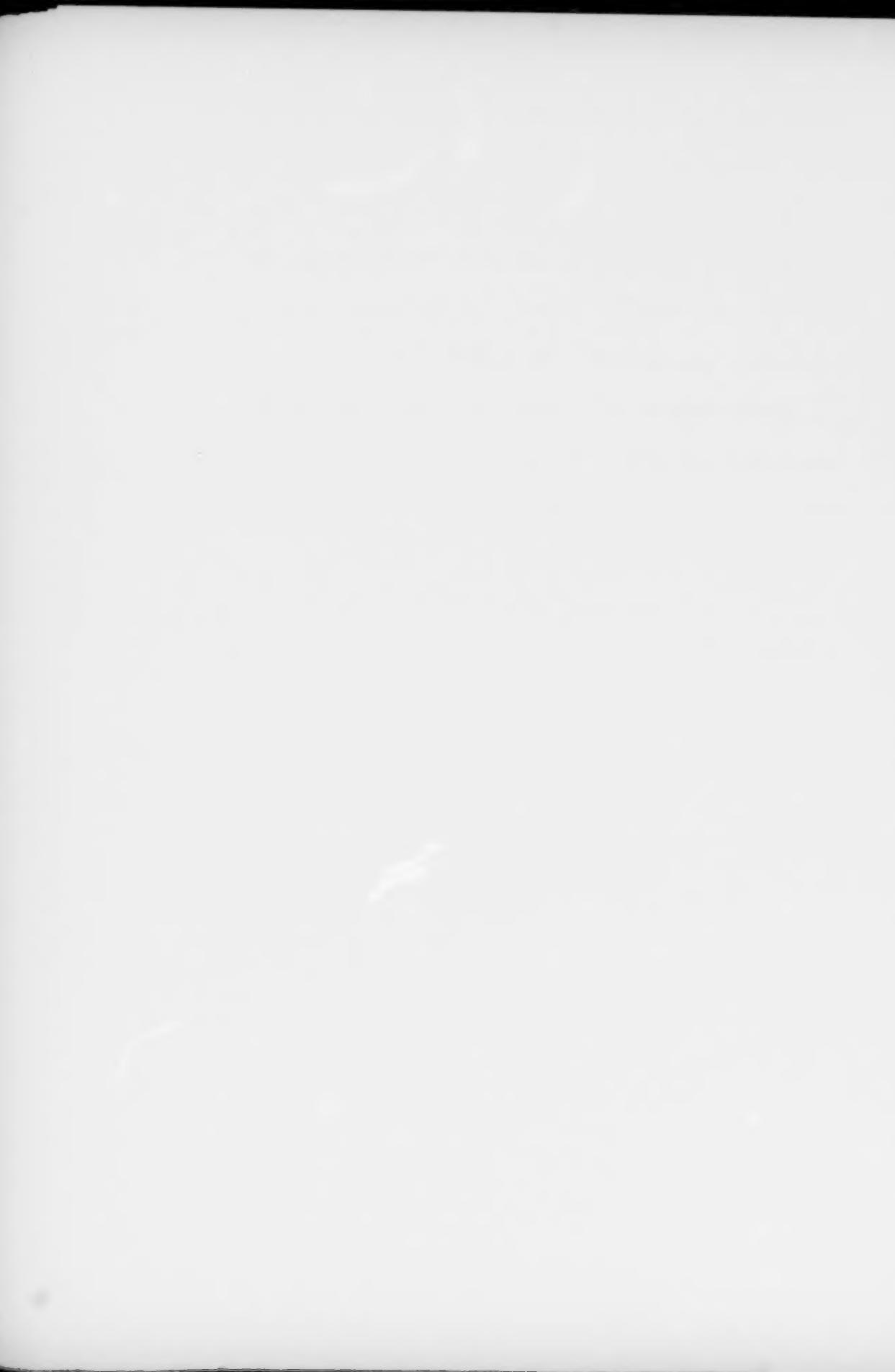
Petitioner timely filed Notice of Appeal (to U.S. Court of Appeals, Ninth Circuit), and following argument (March 13, 1990), the Court of Appeals, on August 1, 1990 filed and entered its



Opinion, affirming the judgment of the U.S. District Court. (910 F.2d 561)

Petitioner timely filed his (Appellant's) Petition for Rehearing in the United States Court of Appeals, Ninth Circuit, on August 20, 1990.

The Court of Appeals, on September 10, 1990 entered its Order: "Appellant's petition for rehearing is denied." (Appendix 8)



## ARGUMENT

(Paragraph Nos. below correspond, to the extent practicable, to the numbers under the section (supra) entitled "QUESTIONS PRESENTED FOR REVIEW".)

1. The rights of confrontation and cross-examination, as well as the right to the presumption of innocence, under federal law, are guaranteed and available to the "accused" in quasi-criminal proceedings (as they are in criminal proceedings).

The "quasi-criminal" character of California State Bar Disciplinary proceedings is beyond dispute, and is tacitly or actually conceded in this instance. Golden v State Bar (1931) 213 Cal. 237, 247; 2 P2d 325; Furman v State Bar (1938) 12 Cal.2d 212, 239; 83 P2d 12;



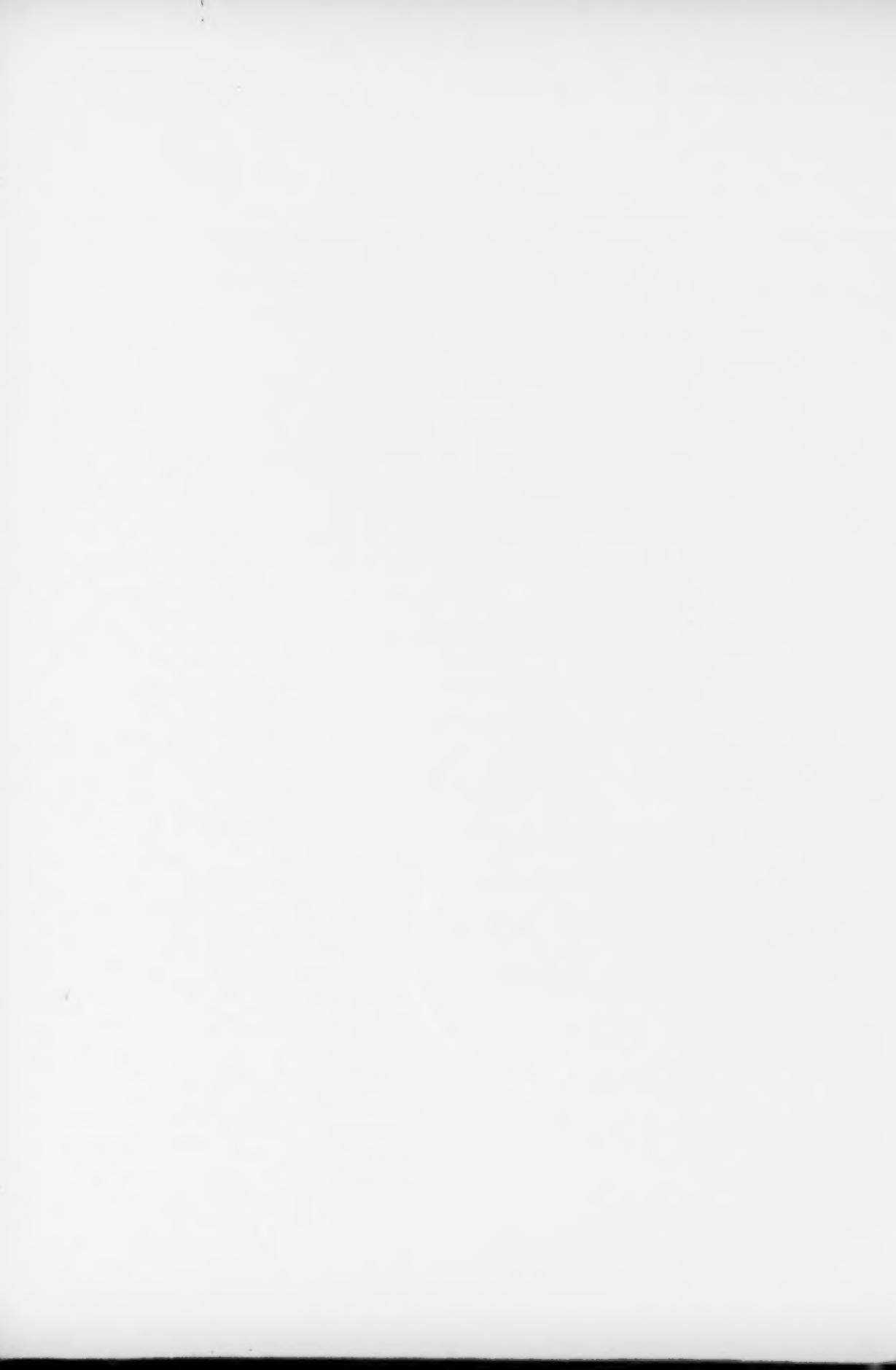
Herrscher v State Bar (1935) 4 Cal.2d 399, 403, 421; 49 P2d 812.

Even more significantly, this Court itself has held in attorney-discipline matter focusing on state statutory and rule procedure, explicitly:

"These are adversarial proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U.S. 1, 33; 87 S.Ct. 1428, 1446." In re Ruffalo (1968) 390 U.S. 544, 551; 88 S.Ct. 1222, 1226.

Similarly, In re Gault (1967) 387 U.S. 1; 87 S.Ct. 1428, 1446 also requires a due process standard constitutionally adequate, in a civil or criminal proceeding. Gault goes so far as to say that constitutional due process is guaranteed to an "accused" whether the proceeding is labelled "civil or criminal." Id 387 U.S. 1, 35.

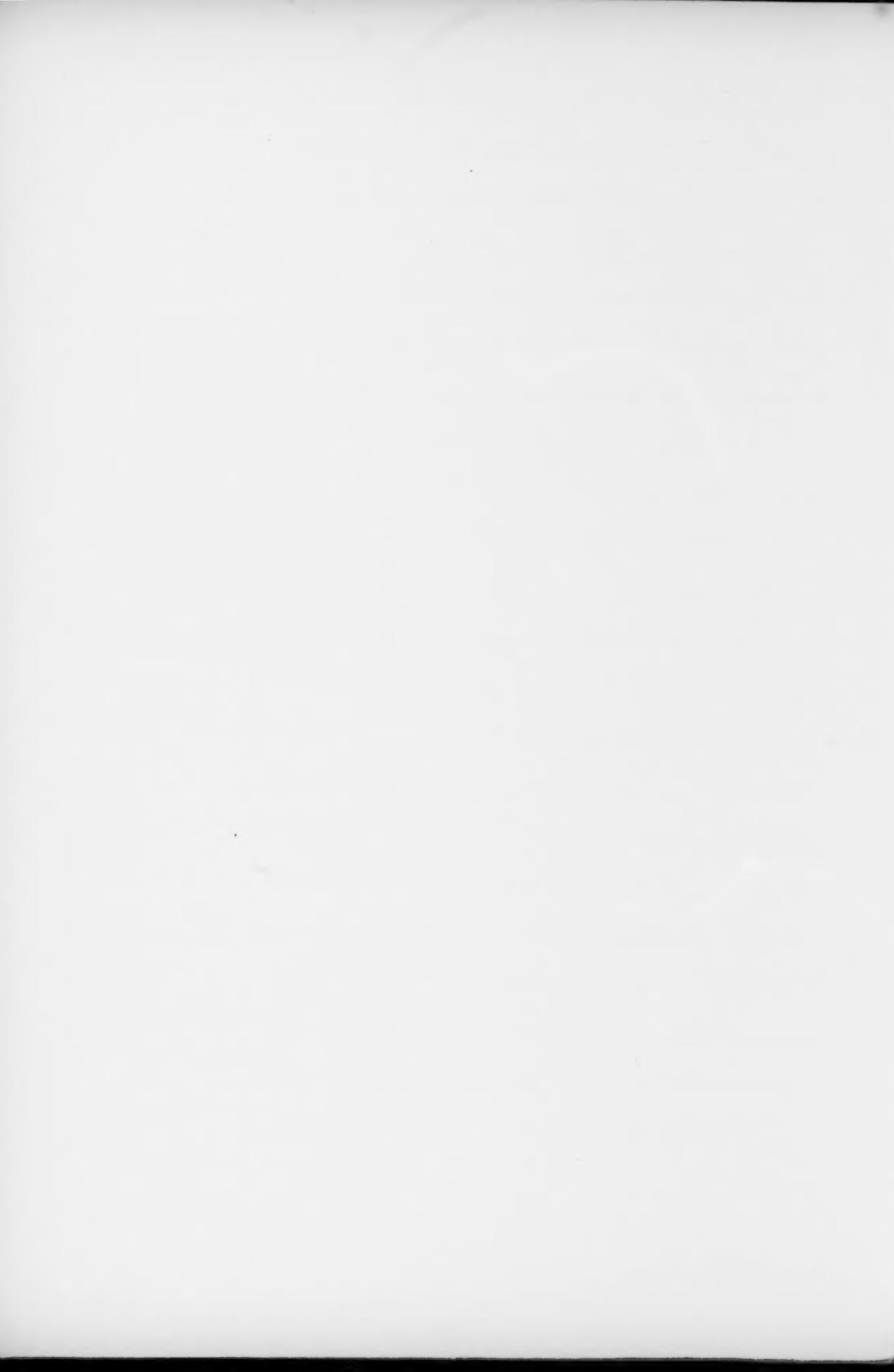
In Willner v Committee, a bar admission case, 373 U.S. 96, the court,



in deciding that denying petitioner the right of confrontation violated due process, stated "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of livelihood."

Finally, in Coy v Iowa, 487 U.S. \_\_\_, 101 L.Ed.2d 857 (June 29, 1988), this Court held that there must be actual confrontation, and that there is no substitute therefor; the procedure that deprives an accused of that right of actual confrontation is unconstitutional.

Thus, the U.S. Court of Appeals, Ninth Circuit, in this matter in its Opinion, 910 F.2d 561, 564 stating..."a lawyer disciplinary proceeding is not a criminal proceeding." and thereby concluding that petitioner's attack on the constitutionality of Section 6083(c) is rejected, has decided a federal



question in a manner that conflicts with the applicable decisions of this Court.

Similarly, the Court of Appeals, (Id. 565) in stating: "We reject Rosenthal's confrontation clause claim. The confrontation clause is a criminal law protection. Therefore, it does not apply to a disbarment case.", has decided a federal question in a way that directly conflicts with the applicable decisions of this Court.

2. When state's highest court functions as an original trier of fact, a state statute which, before that court, shifts the burden of proof of innocence to the "accused" (denying his right to presumption of innocence and imposing on him the burden of overcoming a presumption of intentional wrongdoing) is facially unconstitutional in violation of



due process rights under the 14th Amendment.

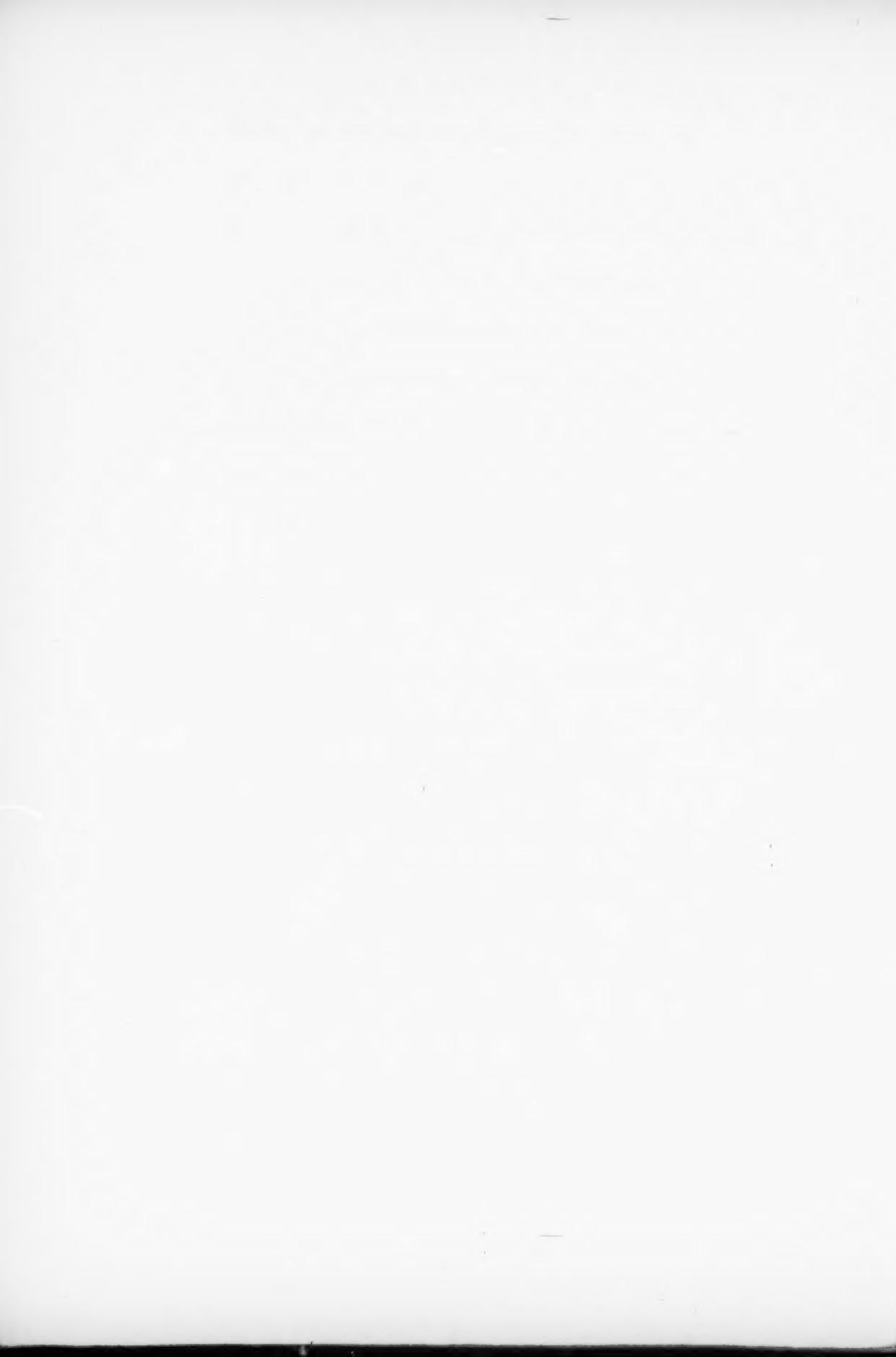
In its role in deciding disciplinary proceedings, the California Supreme Court is the first and only authority that has the right or jurisdiction to decide upon the issues of guilt or innocence, and discipline. Two principles are not disputed and are deeply entrenched in California law:

- (1) That the State Bar has no authority to decide the issue of guilt or innocence or to make any dispositive decision; its authority and function is limited to the making of recommendations to the California Supreme Court; and



(2) The California Supreme Court in bar discipline matters, must and does independently review the record and the evidence, and predicate its dispositive decision on the basis of its own independent determinations (albeit that the Court considers and gives great weight to the recommendations of the State Bar).

Thus, although the California Supreme Court is a Court of "review", and one of last resort and appeal, in dealing with discipline matters, the California Supreme Court is not dealing with an appeal to it from a lower state court, and is not engaged in judicial review of any lower court decisions or of the decisions of any quasi-judicial body.



/

In that context, i.e., before the functional, actual original trier of fact, Section 6083(c) unconstitutionally shifts the burden to the accused (lawyer) to prove his innocence. Miller v Norvell (1985) 775 F.2d 1572, 1576; cert. denied (1986) 90 L.Ed.2d 675; Sandstrom v Montana (1975) 442 U.S. 510; Connecticut v Johnson (1983) 460 U.S. 73.

In the recent case of Carella v California, 491 U.S. \_\_\_, 105 L.Ed.2d 218 (1989), this Court held that jury instructions that the accused defendant was presumed to have wrongful intent or to have committed a crime, violated due process clause of the 14th Amendment.

The Court of Appeals, Ninth Circuit, in this case has decided an important question of federal law in a way which conflicts that the applicable decisions of this Court.



3. A state statute which permits admission into evidence (in a lawyer-discipline proceeding) copies of "findings, conclusions...made or entered in any Court of record", and under which "accused" lawyer has no opportunity to be confronted by or to cross-examine the "author" of the "findings, conclusions..." is unconstitutional in violation of the 6th and 14th Amendments, U.S.

The relevant portion of Section 6049.  
1 reads: "In all disciplinary proceedings in this state...copies of findings, conclusions, orders or judgments made or entered in any court of record...shall be admissible in evidence..." (California Business and Professions Code, Section 6049.1).

It is undisputed that "findings of the bankruptcy court" contained in



certain certificates of review authored by the referee (Texas) were admitted into evidence in the disciplinary proceeding, over objection, to support accusations of wrongdoing by petitioner; those inflammatory and highly prejudicial certificates of review thus admitted in evidence were used by the decision maker, i.e. the California Supreme Court.

Thus, by reason of the statute, Section 6049.1, petitioner was effectively deprived of any opportunity to confront or cross-examine the author (referee in bankruptcy) of the "findings, conclusions..." which were admitted in evidence in the State Bar disciplinary proceedings.

In Willner v Committee (1963) 373 U.S. 96, this Court held that confrontation and cross-examination were required rights, particularly of those whose word 'at least in part, deprives a



person of his livelihood', citing Greene v McElroy (1958) 360 U.S. 474, 492, 496. See Berger v California (1969) 393 U.S. 314; and Gerstein v Pugh (1975) 420 U.S. 103; and Coy v Iowa, 487 U.S. \_\_\_, 101 L.Ed.2d 857 (1988).

Thus, here again in this denial of rights of confrontation and cross-examination, the Court of Appeals has decided a federal question in a way that conflicts with the applicable decisions of this Court.

4. A state court justice, after inviting and receiving party's objection to his participation in the proceeding, and upon receiving such objection of petitioner, recused himself from any further participating in a proceeding, but nonetheless later issues and signs a final order against Petitioner in that proceeding, in so doing is acting in the



absence of any jurisdiction. In such event, the justice loses his judicial immunity and becomes liable for damages to plaintiff in a 1983 civil rights case.

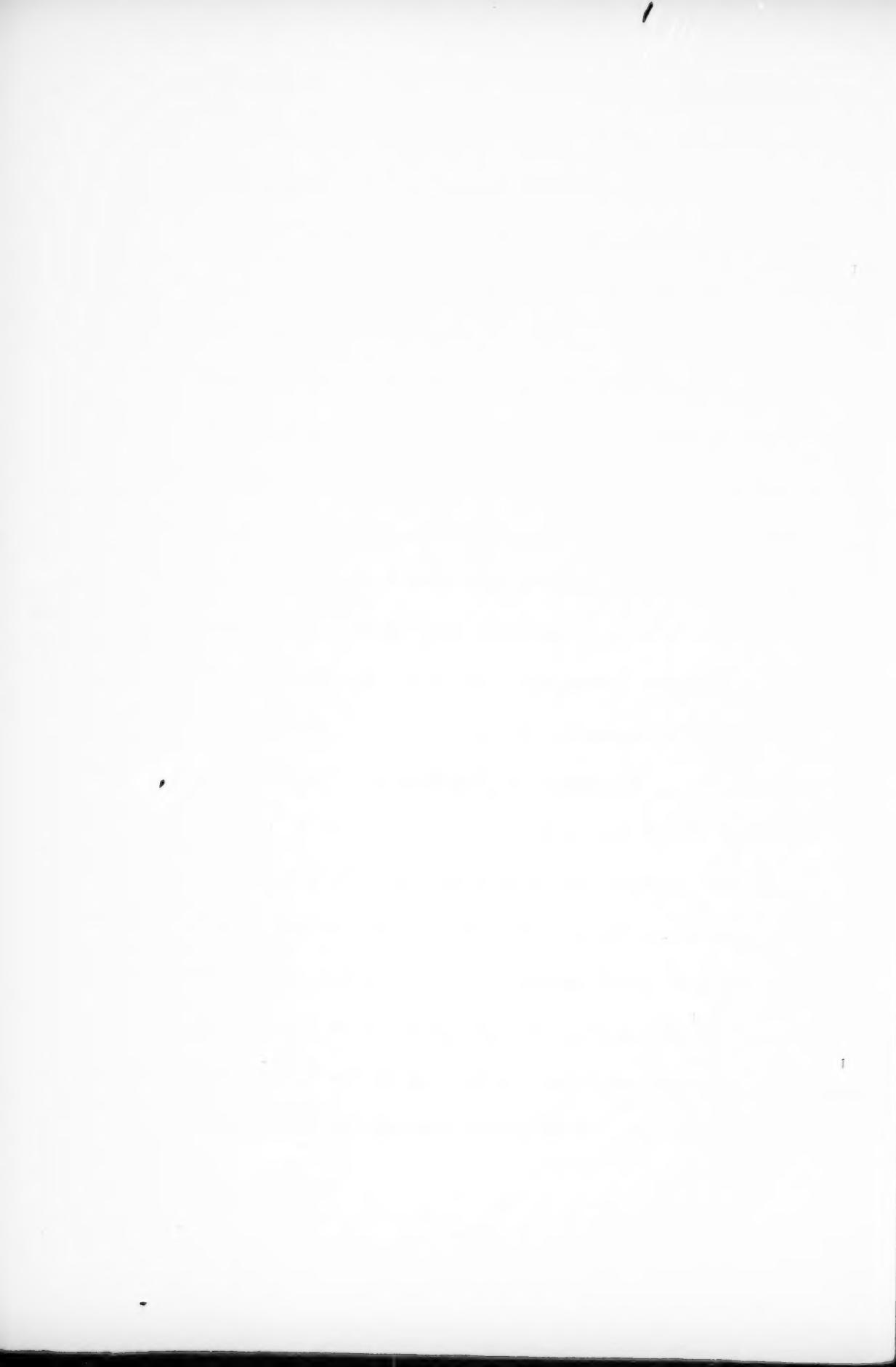
A state judge, under federal principles, who has disqualified himself, and acted in absence of any jurisdiction, is liable for his violations of plaintiff's civil rights under 42 U.S.C. Section 1983. There is striking factual similarity to the instant case because in both cases the judicial official in question recused himself and was stated to be disqualified. Spires v Bottoroff (1963, 9th Cir) 317 F.2d 273, 274, 275. It has also been held that should a justice or judge "recuse or disqualify himself at any time, he is out of service insofar as that particular case is concerned. To disqualify means to debar legally. See Webster's New International



Dictionary, 2d Ed., P. 753. That is synonymous with lack of legal capacity, i.e., with inability to serve." Arnold v Eastern Airlines (1983) 712 F.2d 899, 906. In Giometti v Etienne (1934), 219 Cal. 687, 689, the California Supreme Court observed that appellate justices are subject to the rules of disqualification which apply to judges generally. See also Aetna Life Insurance Company v Lavoie (1986) 475 U.S. 813.

A judge or justice who acts in clear or complete absence of any jurisdiction loses his immunity and is liable for damages. Gregory v Thompson (1974) CCA 9 500 F.2d 59, 62.

The Court of Appeals, Ninth Circuit, has held: "But when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost.



See Bradley v Fisher, 80 U.S. (13 Wall) at 351 ("When the want of jurisdiction is known to the judge, no excuse is permissible."); Turner v Raynes, 611 F.2d 92, 95 (Cir. 5, 1980) (Stump is consistent with the view that "a clearly inordinate exercise of unconferring jurisdiction by a judge - one so crass as to establish that he embarked on it either knowingly or recklessly - subjects him to personal liability.") Rankin v Howard (1980) CCA 9, 633 F.2d 844, 849.

"He (Judge) can be subject to liability only when he has acted in the clear absence of all jurisdiction." Stump v Sparkman (1978) 435 U.S. 349, rehearing denied 436 U.S. 951.

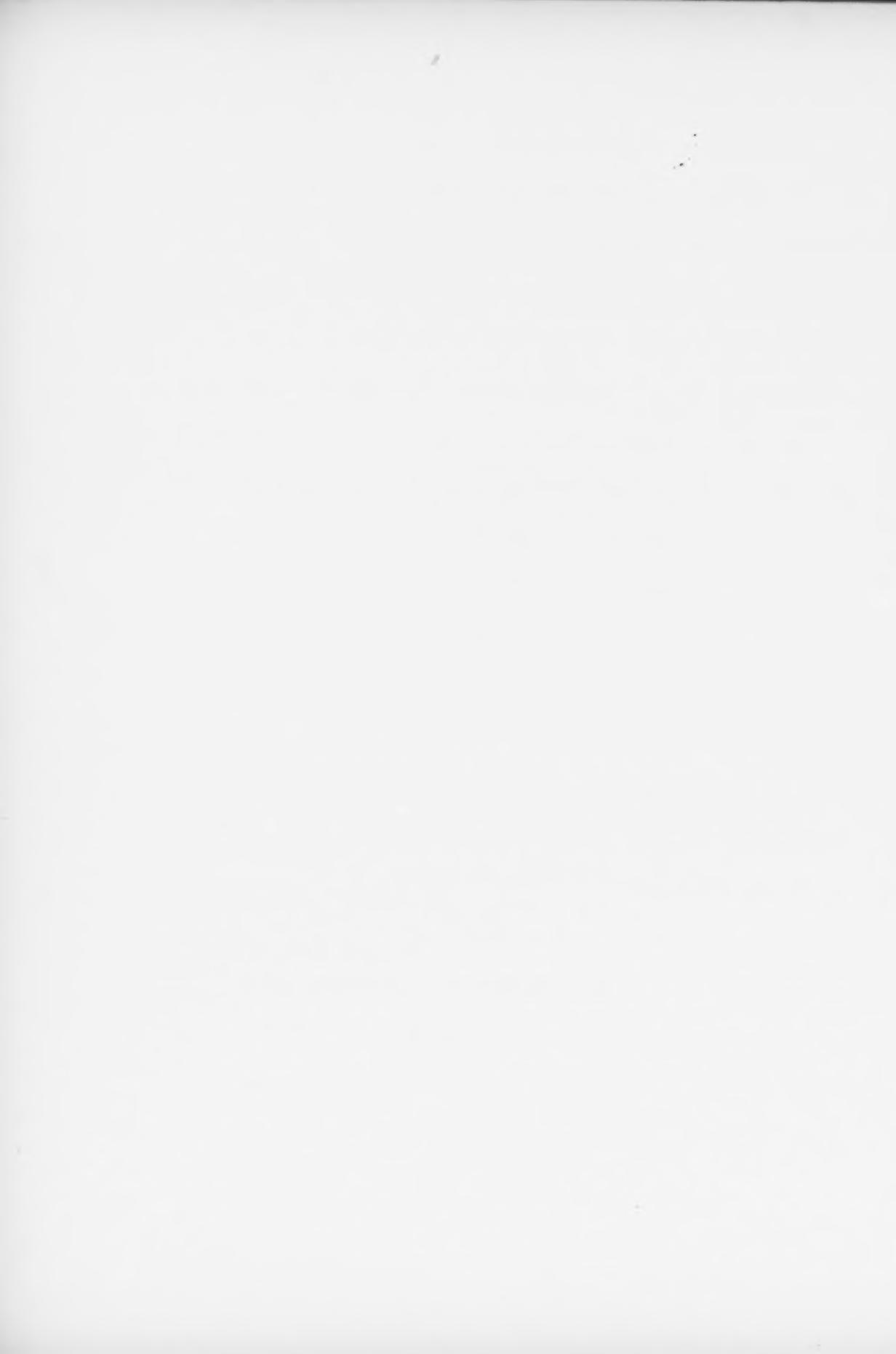
The recent case of Forrester v White, 484 U.S. 219 (1988) establishes the sound principle that the actual function performed, and not the "label" attached



to it, determines the nature of the conduct or act performed.

Hence, in deciding that the self-recused justice in the California Supreme Court did not lose his immunity against liability for damages when after his recusal, he nevertheless violated its terms by participating in the proceedings (signing an order denying application for rehearing), on the ground that the order was a judicial act, the Court of Appeal has either decided an important question of federal law which has not been, but should be, fully settled by this Court, or has decided the question in a way that conflicts with the applicable decisions of this Court.

5. Integrated State Bar Organizations (such as California State Bar), are "labor organizations", under the Labor Management Reporting and



Disclosure Act ("LMRDA"), 29 U.S.C.  
Section 402 et seq., which requires that  
such organization(s) to provide a "full  
and fair hearing" before disciplining or  
expelling a member (lawyer).

California State Bar is a labor organization as defined in LMRDA statute itself, i.e., 29 U.S.C. 402(i) under the heading of "Definitions":

"Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment..."  
(Emphasis added)

The State Bar (California) "exists



for the purpose, in part, of dealing with employers <sup>1</sup>.

The practice of law has been regarded as a "business", and this Court has held that "In the modern world, it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." Goldfarb et ux. v Virginia State Bar, 421 U.S. 773, 788. "The Members of the State Bar are all persons admitted and licensed to practice

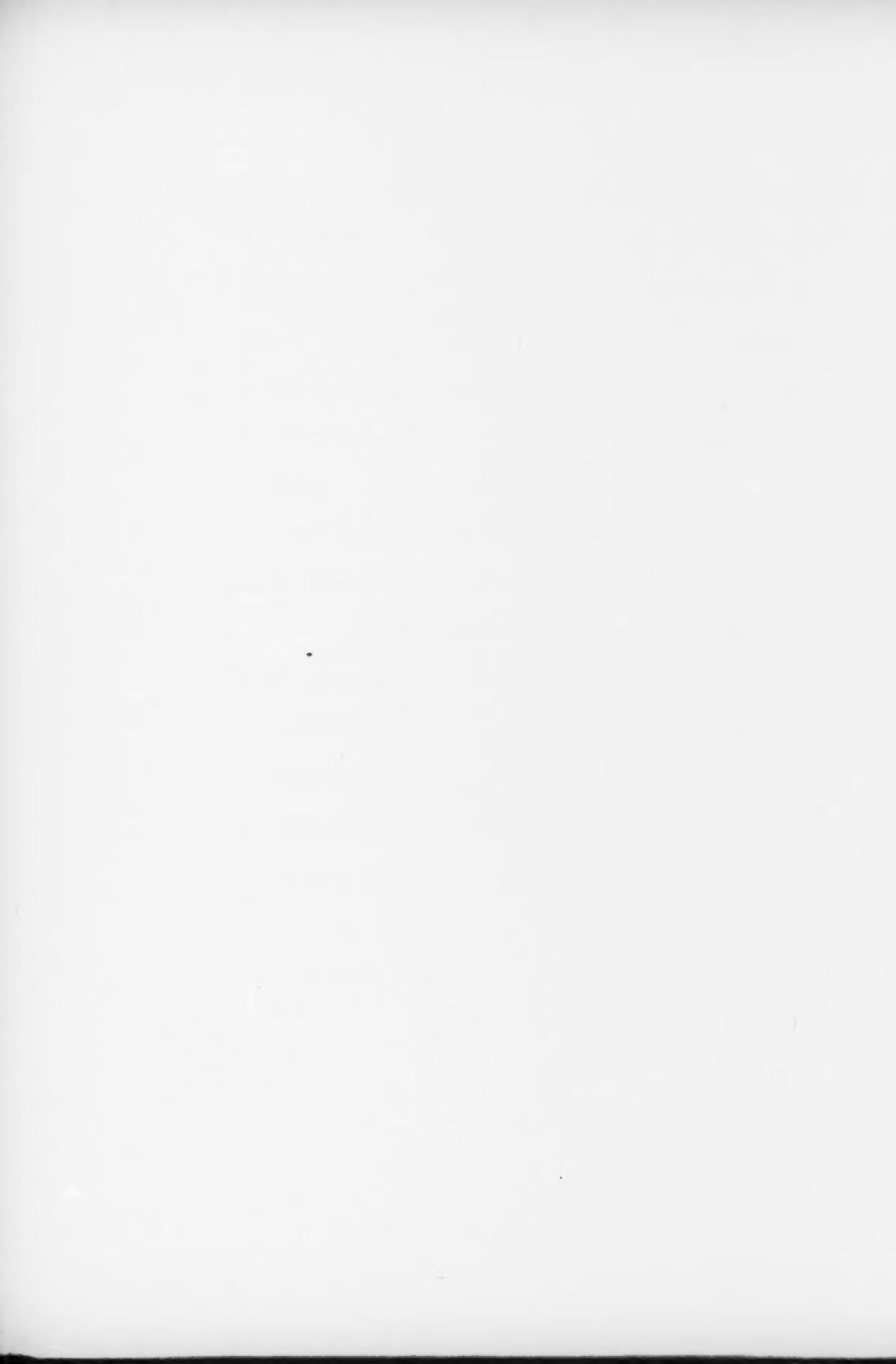
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<sup>1</sup> Independent contractors have been held to be considered as employers, are covered by LMRA. Destroy v American Guild (1960, 61) concerning grievances...rates of pay...or other terms and conditions of employment. Those are the very subjects of complaints (by client-employers) against lawyers (member-independent contractor-employees). California Bus. and Prof. Code Section 6086 provides as follows: "The Board of Governors, subject to the provisions of this chapter, may by rule provide the mode of procedure in all cases of complaints against members". (That statute was in force at all times pertinent to this case).



law in this State except justices and judges of courts of record..." Calif.

Bus. & Prof. Code Section 6002. Under related provisions of the State Bar Act, the State Bar, through its Board of Governors (previously enumerated functions in the State Bar Act) (6001-6031) which include the representation of (through committees or otherwise) lawyer-members. Those provisions collectively and interrelatedly clearly satisfy the "representation" requirement of LMRDA. The FASC (Appendix 15) sets forth the detailed facts concerning the conduct of the "Organization Defendants" alleging the conduct of Organization Defendants which deprive petitioner a "full and fair hearing" within the provisions of LMRDA Section 411(a)(5), which reads as follows:



"No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been... (C) afforded a full and fair hearing."

The Court of Appeals, Ninth Circuit in deciding that the California State Bar is not a labor organization as defined in LMRDA has sanctioned a departure by a lower court (United States District Court) from the accepted and usual course of judicial proceeding, so as to call for an exercise of this Court's power of supervision. That proscribed departure by the U.S. District Court consists of its clearly erroneous disregard of the federal statute, and arbitrary, unsupported by any pertinent authority, determination that the district court "lacks subject matter jurisdiction to consider plaintiff's claim under LMRDA." (Order, U.S. District Court, Appendix 6.



Further, the Court of Appeals, Ninth Circuit, has decided an important question of law which apparently has not been, but should be settled by this Court or arguably, has decided a related federal question in a way that conflicts with applicable decisions of this Court.

6. When state law conflicts with or impedes the operation of federal law such as LMRDA (when both federal and state principles regulate conduct), state action is preempted or is controlled by federal law, under the Federal Supremacy Clause, U.S. Constitution, Article VI, Section 2.

A state action is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, under the Federal Supremacy Clause. This



Court has so held in Brown v Hotel Employees (1984) 468 U.S. 491, 501. If state law regulates conduct that is actually protected by federal law, preemption follows as a matter of substantive right. (During the week preceding the completion of this Petition, the California Supreme Court announced its decision in Screen Extras Guild v Superior Court and Barbara Smith, RPI, on December 3, 1990 in Case No. S006813, 90 Daily Journal DAR 13830; an LMRDA case, in which the California Supreme Court applied Federal Supremacy and resulting preemption in case of conflict or partial conflict between federal and state laws, relying on decisions of this Court).

"Where the issue is one of substantive conflict with federal law, 'the relative importance to the state of its own law is not material...for the Framers of our Constitution



provided that the federal law must prevail. Brown v Hotel Employers, supra, 468 U.S. at p. 503 and Free v. Bland (1962) 369 U.S. 663, 666. In such cases state action is preempted, without balancing state and federal interests, by direct operation of the supremacy clause of the United States Constitution...Brown v Hotel Employers, supra, 463 U.S. at p. 501.

In Keller v State Bar of California, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2228 (1990) this Court reversing the Supreme Court of the State of California held that although lawyers admitted to practice in California may be required to join and pay dues to the State Bar, the State Bar's use of some of the dues thus paid for the purpose of advancing political causes with which plaintiff-members did not agree because such activity by the State Bar, in effect, violated plaintiff's federal First Amendment Rights.



This Court held that "compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession."

In Screen Extras Guild ("S.E.G.") vs. Smith (1990), supra, at p. 13839 after original enactment the perceived need to provide additional protection led to the inclusion of amendments embraced in subchapter 11 (Sections 411-415), the "Bill of Rights" for union members. In relying on this Court's opinion in Finnegan v Leu, 456 U.S. 431, 435-436, the California Supreme Court held that the action of a business agent (an employee) of the Screen Extras Guild, for



wrongful discharge was preempted by LMRDA and the "strong federal policy favoring union democracy it embodies." S.E.G. v Smith, supra 13834.

Although the law may not be clear as to whether Federal Supremacy, federal preemption, or partial federal preemption applies, exhaustive research has not disclosed any, suggestion that state law controls over federal law and preclude the application of federal constitutional, statutory or decisional law to protect federal rights of a member of a labor organization such as the State Bar.

The last sentence suggests the possible implication of "federal abstention". But the abstention doctrine is not any way involved. The FASC itself in the conclusory allegation states (Appendix 15): "The foregoing allegations in this paragraph 10



constitute these well-established exceptions to the doctrine of Younger: bad faith, initiating conduct and prosecution of proceedings; harassing and continuing to harass plaintiff; unusual circumstances calling for equitable relief; and consequent, continuing, ongoing and threatened irreparable injury to plaintiff (petitioner)."

Quite apparently, the decisions below and that of the California Supreme Court in Screen Extras Guild v Smith have decided an important question of federal law which has not been, but should be settled by this Court. Narrowed, the question is whether the importance of the state interest in disciplining lawyer members of the State Bar is such that the state procedures should preclude a member's right to seek the protection guaranteed him by federal constitutional provisions and statutes. In other words,

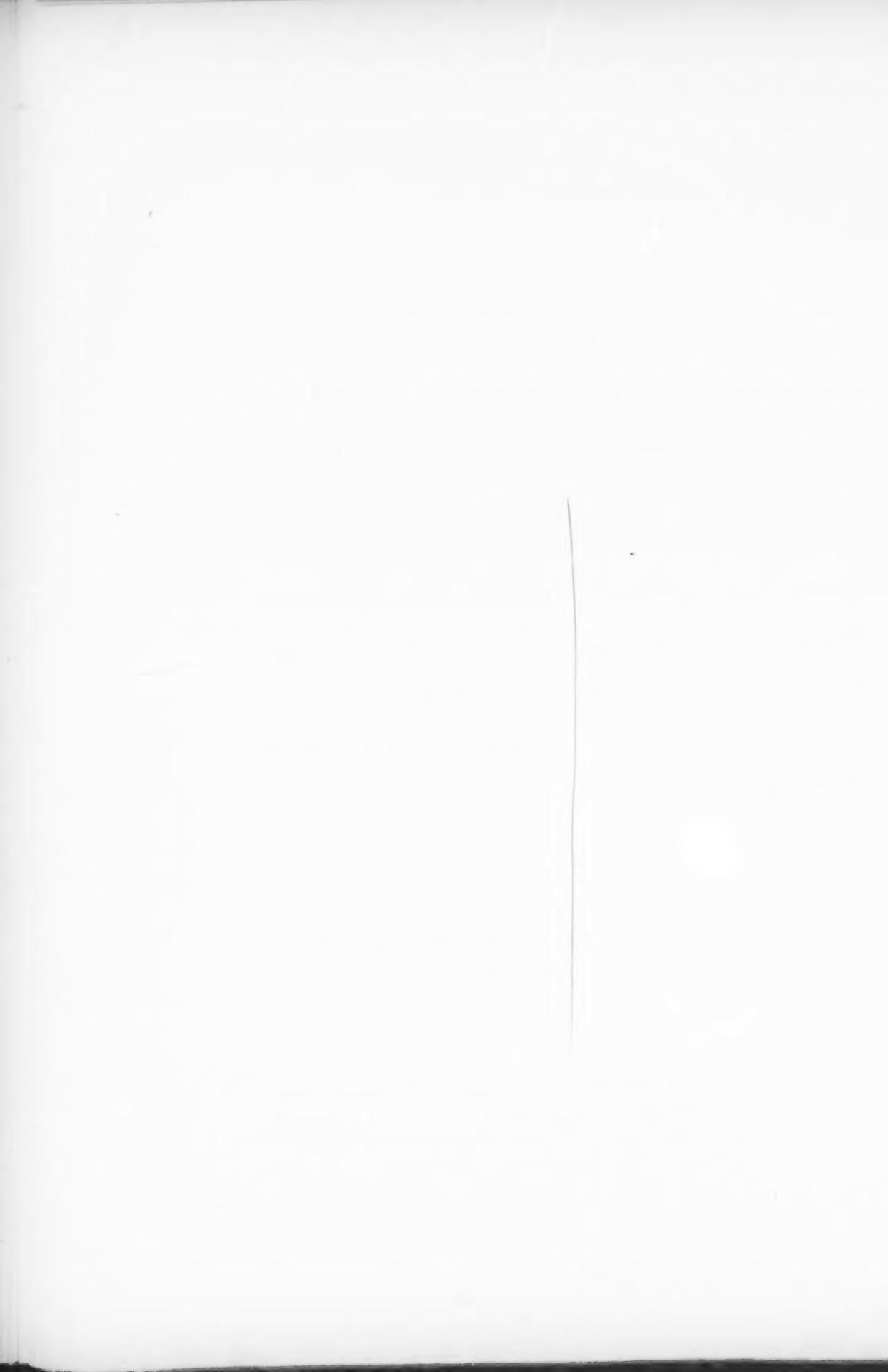


when the federal constitutionality of state statutes is challenged, which "system" should yield? State or Federal?

7. In a Bar matter, where plaintiff brings suit in federal district court seeking to enforce his federal constitutional rights in general challenges of state statutes' federal constitutionality, the federal (district) court has subject matter jurisdiction, where plaintiff need not and does not seek review of a state court's adjudication of a particular case (application).

In District Columbia Court of Appeals v Feldman, 460 U.S. 462 (1983), this Court stated:

"To the extent that Hickey and Feldman mounted a general challenge to the constitutionality of Rule



461(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints. The difference between seeking review in a federal district court of a state court's final judgment in a bar...matter and challenging the validity of a state bar admission rule has been recognized in the lower courts and, at least implicitly, in the opinions of this Court." 460 U.S. at 483, 484.

In Feldman, this Court also stated: "We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. See, e.g. Supreme Court of Virginia v Consumers Union, 446 U.S. 719...Lathrop v Donahue, 367 U.S. at 827...challenges to the constitutionality of state bar rules, therefore, do not necessarily require a U.S. District Court to review a final state court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a



nonjudicial proceeding. If this is the case, the District Court is not reviewing at state-court judicial decision." Id 460 U.S. 486.

In the instant case, the same rules should be applied. Here, in place of the plaintiff's attacking the validity of a rule promulgated by a state supreme court, he attacks the validity of another "nonjudicial" creation, i.e. a legislative one, namely a state statute.

Certainly, if the notion that gives subject matter jurisdiction in such matters is, indeed, the nonjudicial character of the rule or provision being attacked, certainly the act of a legislature (a state statute) should be treated the same as another "nonjudicial" promulgation, i.e. a state supreme court rule regulating the bar.

In Feldman, as to another aspect, this Court stated:



"The remaining allegations in the complaint, however, involve a general attack on the constitutionality of Rule 461(b)(3). The respondents' claims that the rule is unconstitutional because it creates an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, discriminates against those who have obtained equivalent legal training by other means, and impermissibly delegates the District of Columbia Court of Appeals power to regulate the bar to the American Bar Association, do not require review of a judicial decision in a particular case. The District Court, therefore, has subject-matter jurisdiction over these elements of the respondents' complaints." Id. 460 U.S. 487.

In the instant matter, likewise, the general attack on state statutes for their federal unconstitutionality do not require review of a "judicial decision in a particular case."

The Court of Appeals, Ninth Circuit, in its Opinion simply referred to the wrong aspect of Feldman and erroneously therefor came to the conclusion that



"only the United States Supreme Court, and not this Court, has jurisdiction to look behind that decision", referring to the disbarment decision in the California Supreme Court.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

DATED: December 9, 1990.

Respectfully submitted,

JEROME B. ROSENTHAL  
6535 Wilshire Blvd.  
Suite 800  
Los Angeles, CA 90048  
(213) 658-6411  
(213) 658-6778

Petitioner, Pro Se

125pfc